IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76-6513

WILLIE LEE BELL,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR PETITIONER

OF COUNSEL:

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
DAVID E. KENDALL
Suite 2030
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

H. FRED HOEFLE
CHARLES LUKEN
400 Second National Building
830 Main Street
Cincinnati, Ohio 45202
Telephone: 1-513-241-1268

Attorneys for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76-6513

WILLIE LEE BELL,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR PETITIONER

BRIEF FOR PETITIONER

Willie Lee Bell respectfully submits this brief on his behalf.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio [A. 130], reported at 48 Ohio St.2d 270, 358 NE.2d 556, and the opinion of the Court of Appeals for the First Appellate District of Ohio [A. 144], not yet reported, are reproduced in the Appendix.

JURISDICTION

Jurisdiction of this Court is based on the order of the Court granting the Petition for a Writ of Certiorari to the Supreme Court of Ohio, entered June 27, 1977, and is invoked under 28 USC § 1257 (3), the Petitioner having asserted below and in this Court a denial of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves certain provisions of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, the Ohio statutes governing the infliction of the penalty of death, and certain other Ohio statutes:

A. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In pertinent part, the Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by . . . jury."

B. THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

C. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In pertinent part, the Fourteenth Amendment provides:

". . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

D. THE OHIO AGGRAVATED MURDER STATUTES:

§ 2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2929.02 Penalties for murder

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will

prevent him from making reparation for the victim's wrongful death.

§ 2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a

psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

THE OHIO COMPLICITY (AIDER AND ABETTOR) STATUTE:

OHIO REVISED CODE

E. Complicity. §2923.03, R.C.

1. Text of §2923.03, R.C., eff. 1-1-74.

§2923.03 (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

(1) Solicit or procure another to commit the offense;

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of §2923.01, R.C.;

(4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of §2923.02, R.C.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

QUESTION PRESENTED

Whether the imposition of the sentence of death for the crime of aggravated murder under the laws of the State of Ohio (effective January 1, 1974) violates the protection against cruel and unusual punishment secured to all persons by the Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

On the evening of October 16, 1974, Petitioner, Willie Lee Bell, then 16 years of age, met a casual friend named Samuel Hall, who was 18 years old, at a youth center in the Avondale section of the City of Cincinnati, Hamilton County, Ohio. Petitioner, who had been smoking marijuana, ingested mescaline before the two young men left the center and went to Hall's home a short distance away. Hall borrowed his brother's Pontiac auto, and drove Petitioner around the area. As they passed the Park Lane Apartments, Hall turned into the apartment property and followed a 1974 Chevelle into the parking garage. As the Chevelle parked, Hall got out of the Pontiac, taking from a place of concealment between the front seat and the left door, a sawed-off shotgun [R. 337].

Leaving Petitioner in the auto, Hall approached the driver of the Chevelle, 64 year old Julius Graber, accosted him with the shotgun, relieved him of his keys, and forced Mr. Graber into the trunk of his own car. Hall then entered the Chevelle and signalled Petitioner to assume control of the Pontiac and to follow the Chevelle. Petitioner complied, and followed Hall to Hall's residence. Hall parked his brother's Pontiac and directed Petitioner to drive the Chevelle. Following Hall's directions, Petitioner drove the Chevelle generally westward through Cincinnati, and finally proceeded up Groesbeck Road. As the Chevelle proceeded past Spring Grove Cemetery, Hall directed Petitioner to pull into a service drive, but the order came too late, and Petitioner had passed the drive. Petitioner placed the car in reverse and backed up the service drive a short distance. He asked

Hall "What we was going to do now?" Hall replied, "We'll see. Give me the keys." [R. 340].

Petitioner gave the keys to Hall, who opened the trunk, released Mr. Graber from the car, and marched him up the service road into the dark forested area to the rear of the cemetery. Petitioner remained at the auto. A shot was heard, and Mr. Graber cried to Hall not to shoot him again. Hall ran out of the darkness, reloaded the single-shot weapon with a shell from the vicinity of the back seat, and returned up the service drive into the woods, from where another shot was heard shortly thereafter. Hall returned alone to the auto and took the wheel. He drove to Dayton, where he and Petitioner spent the night with friends of Hall. [R. 340].

The cemetery service drive was across the road from the entrance of an apartment complex where resided one Robert Pierce. [R. 165]. Pierce noticed the Chevelle in the service drive as he returned home from his employment at approximately 10:45 P.M. He parked in the parking lot and remained in his car to listen to the baseball game on his car radio. He heard two car doors close, a voice saying "don't shoot me," and two shots. He saw an individual get into the Chevelle, slide across the front seat, heard two car doors close and saw the Chevelle leave the service drive. He went into his apartment and called the police. [R. 156-166].

The police responded quickly, and found Mr. Graber lying face down in a wooded area several feet from the service drive, and 176 feet from Groesbeck Road [R. 221]. He had suffered from two wounds: a slight wound about 1" in diameter to his right cheek, and a massive wound in the back of his head. He died on the way to the hospital without regaining consciousness. It was later discovered that Mr. Graber had secreted money and other valuables in his shoes.

The next day, Hall was arrested near Dayton by an Ohio state policeman while driving a car he had stolen at gunpoint, with the owner of the car in the trunk. Petitioner, following Hall in Mr. Graber's Chevelle, continued past the officer and Hall, obtained directions, and returned to Cincinnati. He abandoned the auto in the garage of an abandoned apartment house a block from his home, and returned home.

Petitioner continued to take drugs after the killing as he had done before for three years, on a daily basis [A. 74-76], and about a week after the killing of Mr. Graber, Petitioner voluntarily accompanied police to headquarters to answer questions about Samuel Hall. When it became apparent that Petitioner was a suspect in the Graber slaying, he was warned of his constitutional rights and gave a statement to the police admitting the facts as set forth herein, but specifically denying any participation in the killing, and denying that he knew what Hall's intentions were when Hall marched Mr. Graber up the service drive at gunpoint. [Petitioner's statement was recorded and replayed at the trial, and appears in the Record at 331-353].

Petitioner was charged in the Juvenile Division of the Court of Common Pleas and was bound to the Hamilton County, Ohio Grand Jury for consideration as an adult offender, as provided by Ohio law [A. 1]. He and Hall were jointly charged in a four-count indictment, charging the two with two counts of aggravated murder, one count each of aggravated robbery and kidnapping, and with two specifications of aggravating circumstances, thus making the crime a capital offense [A. 3-7].

Petitioner entered a plea of not guilty and not guilty by reason of insanity, and a panel of three psychiatrists was appointed to report to the court on his present mental condition. That report [A. 38, *et. seq.*] concluded that Petitioner was sane, although he had had prior contact with psychiatrists because "he claims the principal thought he was crazy." [A. 39]. His I.Q. was estimated at 90, and his drug involvement was detailed. It was concluded that, although he suffered from a moderately diminished capacity to comprehend the seriousness of his predicament [R. 12; 18; 26] he was capable of standing trial and assisting counsel. At the hearing, Petitioner was found capable of standing trial and a motion to suppress his statement was denied [A. 15; A. 119]. Thereafter, Petitioner waived a jury trial, and a three-judge panel proceeded to try the case [A. 12-14].

At the trial, the only evidence as to the occurrences on the service drive was circumstantial, save Pierce's testimony and Petitioner's statement. The only other evidence linking Petitioner to the offense was evidence of his fingerprint on the outside of the left window of Mr. Graber's auto [R. 420-430]. Petitioner was found guilty on one count of aggravated murder, the specification to that count of an aggravating circumstance, aggravated robbery, and kidnapping [A. 16-17]. A further examination by the same three psychiatrists was ordered, along with a presentence report by the probation department as provided by law, and a penalty trial was scheduled.

At the penalty trial, the three judge panel heard an unsworn statement from Petitioner [A. 73-82], and testimony from three of his teachers, to the effect that he was on drugs on a daily basis for three years, and was emotionally immature both in relation to his juvenile peers and by adult standards. He was enrolled at a school for disruptive youth, young persons with emotional problems, who were not considered normal by the School Board. [A. 82-92]. A 1972 school psychiatric report was placed into evidence [A. 93] which indicated that at that time Petitioner's I.Q. was 81. [Def. Ex. 1, also referred to in the probation department report, A. 58]. One of the psychiatrists testified at the instance of the State, and indicated that the psychiatrists found that Petitioner was not psychotic or mentally deficient, and that he tested for I.Q. purposes at 110-120. He conceded that the difference in the estimated I.Q. of 90 before the trial and the test results following conviction could be explained by the fact that the lack of drugs during his stay in jail from October through January, with a regular diet and routine, would improve Petitioner's responses [A. 104-5]. The psychiatrist admitted, however, that Petitioner's three years of daily drug involvement was not considered in the post-conviction sentence report [A. 105].

A motion which had been filed attacking the Ohio death penalty as unconstitutional [A. 18] was argued in the midst of the penalty trial [A. 106-110], and was overruled [A. 113]. The panel unanimously found that none of the statutory mitigating circumstances had been established by a preponderance of the

evidence, and sentenced the Petitioner to two consecutive terms of 7-25 years imprisonment on the kidnapping and robbery counts, and to death on the aggravated murder count. [A. 20; A. 129].

Petitioner's appeal to the Ohio First District Court of Appeals was denied [A. 22], as was his appeal to the Ohio Supreme Court [A. 27]. The Ohio Supreme Court also denied rehearing [A. 35], and a stay of execution was granted pending disposition of the cause in this Court. [A. 36]. Certiorari was granted by this Court on June 27, 1977 [A. 165].

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

A motion attacking the unconstitutionality of the Ohio death penalty statutes on Eighth and Fourteenth Amendment grounds was filed in the trial court [A. 18], and was denied [A. 113]. The same challenge was made in the Court of Appeals, and was denied [A. 151]. The Ohio Supreme Court rejected the same contention [A. 135]. A Petition for rehearing was filed in the Ohio Supreme Court, detailing the unconstitutionality of the Ohio laws in light of the *Gregg* series, which had been announced after filing of the briefs in that Court. The *Gregg* arguments had been made in oral argument in the Ohio Supreme Court in October. Rehearing was denied [A. 35].

SUMMARY OF ARGUMENT

The Ohio capital punishment statutes are unconstitutional because the Ohio laws fail to require, or even to permit, the consideration of the character and record of the accused as a meaningful part of the capital sentencing process. The narrowness of the statutory mitigating circumstances, and the even narrower interpretation of those mitigating facts by the Ohio Supreme Court have resulted in a virtually mandatory death sentencing scheme with only an extremely limited exception for offenders who are

psychotic or severely retarded, whose mental defect is a primary cause of the offense. The Ohio statutes, as interpreted by the Ohio Supreme Court, have created a system where the good character and record of the offender make the death penalty more likely, rather than less likely.

The application of the statutes to this Petitioner, in particular, violate the Eighth and Fourteenth Amendments. Because of the narrow and inflexible Ohio approach that bars consideration of virtually all relevant mitigating circumstances, the judges who sentenced Petitioner to die for the killing of Julius Graber were forbidden to consider in their sentencing deliberations even the facts that Petitioner did not personally kill Mr. Graber, did not intend Mr. Graber's death, and was a minor participant in Samuel Hall's killing of Mr. Graber. The sentencing judges were similarly precluded from taking account of Petitioner's youth, emotional immaturity, drug dependence, cooperation with the police, and other mitigating factors in determining whether death or imprisonment was the appropriate punishment for his crime.

Petitioner contends that the infliction of the death penalty upon a defendant who is held vicariously liable for a homicide and is not himself found to have deliberately committed any homicidal act is disproportionate and excessive, and thus violates the constitutional guarantee against cruel and unusual punishments. Its excessiveness is particularly manifest in the case of a 16 year old defendant who has all of the other mitigating characteristics shown by this record. But even if the Eighth and Fourteenth Amendments did not absolutely forbid such a sentence in any such case, they would surely forbid a death-sentencing process in which neither Petitioner's relative lack of culpability for the killing by Hall of Mr. Graber nor Petitioner's other mitigating attributes could be taken into account and weighed by his sentencer.

The Ohio procedures for determining the appropriateness of the death penalty are inadequate for several other reasons:

First, the jury is totally excluded from the sentencing process, so that it cannot perform its historic function of assuring that there is community contribution to the decision of whether one of its citizens shall live or die. The life or death decision is made not by

the governed, but solely by agents of the State. Indeed, the defendant's election of a jury trial of the issues of guilt and degree of homicide is needlessly discouraged by the statutory capital scheme, in a manner that constitutes an independent violation of the Sixth and Fourteenth Amendments.

Second, the risk of nonpersuasion is placed upon the accused at the penalty trial. Since the sentencing authority has no discretion whatever to spare the offender's life unless one of but three narrow and exclusive mitigating circumstances exists, to a preponderance, an offender must be sentenced to die even where it is precisely as likely as not that the statutory mitigating circumstance(s) is present.

Third, the Ohio appellate courts conduct no meaningful sentencing review. Their consideration of the mitigating facts present in any given capital case is restricted by a doctrine of excessive, even total, deference to the trial court's findings as to the existence of mitigating circumstances. Although the Ohio Supreme Court is the only Ohio court with statewide appellate jurisdiction, it conducts no comparative review of death sentences from case to case to assure consistency, regularity and even-handedness in capital sentencing.

ARGUMENT

THE IMPOSITION OF THE SENTENCE OF DEATH FOR THE CRIME OF AGGRAVATED MURDER UNDER THE LAWS OF THE STATE OF OHIO (EFFECTIVE JANUARY 1, 1974) VIOLATES THE PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT SECURED TO ALL PERSONS BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In *Furman v. Georgia,* 408 U.S. 238 (1972), this Court struck down capital punishment as it was then applied by the states on the

basis that the death penalty as applied violated the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the Constitution of the United States, which prohibition had previously been applied to the states through the Fourteenth Amendment, *Robinson v. California,* 370 U.S. 660 (1962).

After the decision in *Furman,* most state legislatures, including the Ohio General Assembly, attempted to fashion new statutory schemes for the imposition of the death penalty which would withstand constitutional challenges based on *Furman.* The new Ohio aggravated murder statutes here under attack were enacted by the Ohio legislature and went into effect on January 1, 1974.

On July 2, 1976, this Court decided five cases construing statutory capital punishment provisions enacted by five states in response to *Furman: Gregg v. Georgia,* 428 U.S. 153; *Jurek v. Texas,* 428 U.S. 262; *Proffitt v. Florida,* 428 U.S. 242; *Woodson v. North Carolina,* 428 U.S. 280; and *Stanislaus Roberts v. Louisiana,* 428 U.S. 325. The Court, stating that "each distinct system must be examined on an individual basis," *Gregg v. Georgia, supra.*, 428 U.S. at 195, held that capital punishment is not *per se* unconstitutional as cruel and unusual, upheld the death penalty under the Georgia, Florida and Texas statutes, and rejected as unconstitutional the mandatory death penalties provided by North Carolina and Louisiana.

It shall be demonstrated that the Ohio legislature, in attempting to frame a constitutional scheme for the imposition of the death penalty prior to the clarification of the *Furman* decision by the *Gregg* series fashioned a death penalty statute that is mandatory for all practical purposes, providing only an extremely limited exception to offenders who are psychotic or severely mentally retarded. Misapprehending the constitutional requirements enunciated by *Furman,* the legislature created a rigid, arbitrary process which ignores the command of the Constitution requiring a fair and equitable procedure "to select persons for the unique and irreversible penalty of death," *Woodson v. North Carolina, supra.*, 428 U.S. at 287.

I.

OHIO HAS CONSTITUTIONALLY CONDEMNED PETITIONER TO DEATH UNDER A SENTENCING SCHEME, MANDATORY FOR PRACTICAL PURPOSES, WHICH PRECLUDES THE MEANINGFUL CONSIDERATION OF THE CHARACTER AND RECORD OF THE OFFENDER, AND EVEN OF THE DEGREE OF HIS INVOLVEMENT IN THE CAPITAL CRIME, AS RELEVANT FACTORS IN THE DECISION OF WHETHER HE SHALL LIVE OR DIE.

In the five cases decided by this Court on July 2, 1976, referred to herein collectively as "the *Gregg* series," the Court analyzed the statutory schemes of five states, with a view toward determining whether each state provided for the meaningful consideration of the character and record of the offender as particularized mitigating factors. The Court held that such consideration was required by the Eighth Amendment:

> . . . we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . *requires* consideration of the character and record of the individual offender and the circumstances of the particular offense as a *constitutionally indispensible* part of the process of inflicting the penalty of death.

Woodson v. North Carolina, supra., 428 U.S. at 304, (Emphasis added).

In support of the conclusion that the Constitution requires consideration of the character and record of the offender, the Court stated in *Woodson*, also at 428 U.S. 304:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual

> human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

In *Woodson* and *Stanislaus Roberts*, this Court rejected as unconstitutional the mandatory death penalty statutes of North Carolina and Louisiana, respectively. As the Court concluded in Stanislaus Roberts:

> The Eighth Amendment, which draws much of its meaning from "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101, simply cannot tolerate the reintroduction of a practice so thoroughly discredited.

428 U.S. at 336.

One basis for the Court's ruling that mandatory capital punishment statutes are unconstitutional was that the development of a mature society involves an enhancement of civilized values away from the concept that all persons convicted of a particular crime deserve the death penalty. In such a developing society, the Constitution contemplates consideration of contemporary community values in determining what punishment is cruel and unusual under the Eighth and Fourteenth Amendments. The Court found that "the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid," *Woodson, supra.*, 428 U.S. at 293. A mandatory scheme is offensive to the Constitution because "under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murders," *Id.*, at 296. It was found to be "evident that the post-*Furman* enactments [of state death penalty schemes] reflect attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing," *Id.*, at 298.

Another reason for condemning mandatory capital punishment was that a mandatory statute does not and cannot provide for the consideration of the particularized mitigating factors of the character and record of the offender which the Court has held to be

constitutionally required. In *Harry Roberts v. Louisiana,* ____ U.S. ____ , 97 S. Ct. 1993 (1977), this Court again found Louisiana's mandatory death penalty in violation of the Eighth and Fourteenth Amendments, even where the victim of the murder is a police officer engaged in his duties when slain. It is evident, therefore, that mandatory death penalty statutes are unconstitutional, and that if Ohio's scheme is mandatory in substance and practice, it is unconstitutional.

A. THE OHIO CAPITAL PUNISHMENT STATUTES ARE SO NARROW AND RIGID THAT THEY AFFRONT THE CONSTITUTIONAL PRINCIPLES FORBIDDING MANDATORY DEATH SENTENCES.

Before detailing the reasons that Ohio's capital sentencing scheme is virtually mandatory, we note that our view is shared by no less an authority than Judge Whiteside, of the Court of Appeals in Franklin County, Ohio, and who sat by designation at the appellate level below.[1] Judge Whiteside is the author of the leading manual on appellate practice in Ohio.[2] In an unreported case, which was later affirmed by the Ohio Supreme Court, *State v. Harris,*[3] Judge Whiteside characterized the Ohio death penalty as "mandatory," a view which was quoted *in toto* by the Court of Appeals below, which quoted that conclusion, stating that Judge Whiteside's language was "cited with approval," [A. 151]. Our own Court of Appeals has, therefore, characterized the Ohio capital statutes as "mandatory." The Ohio Supreme Court ignored the characterization.

---

[1]Judge Whiteside sat on our panel in the Court of Appeals, being designated for that purpose because Judge Keefe, who presided at Petitioner's trial, had been elected to the Court of Appeals and was disqualified from hearing Petitioner's appeal.

[2]Whiteside, *Ohio Appellate Practice,* Banks-Baldwin (1975).

[3]*State v. Harris,* unreported, #74AP-580, affirmed 48 Ohio St.2d 351, 359 N.E.2d 67.

While the Ohio death penalty is not absolutely mandatory, Ohio's capital statutes are "unduly harsh and unworkably rigid" within the meaning of the language and the reasoning of the Court in *Woodson, supra.,* 428 U.S. at 293, because they arbitrarily compel a death sentence in virtually every case where the offender is convicted of aggravated murder with specifications. Following such a conviction, the sentencing authority is not "allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed," *Jurek v. Texas, supra.,* 428 U.S. at 271. The convicted offender can avoid the death penalty only where the trier of the fact at the penalty trial finds that one of three exclusive mitigating circumstances is established by a preponderance of the evidence: (1) the victim of the offense induced or facilitated it; (2) it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation; or (3) the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity, R.C. 2929.04(B).

It is apparent that the determination of the existence of any of these three mitigating circumstances involves nothing more than strictly limited fact-finding by the sentencing authority. If that authority finds that any of the enumerated facts exists, the offender's life is spared; if the trier of the fact fails to find that one of the three mitigating facts established by the statutes exists, it has no alternative but to sentence the offender to death—there is no discretion to extend mercy. The removal of sentencing discretion in Ohio capital cases is not accidental. The Ohio Senate Judiciary Committee felt obliged to "[r]efine the House position by retaining the death penalty, but remov[ing] from the judge and jury [later deleted] as much discretion as possible in the punishment determination procedure." Lehman and Norris, *Some Legislative History and Comments on Ohio's New Criminal Code,* 23 Cleve. State L. Rev. 8, 18, 20 (1974).[4]

---

[4]The authors were the co-sponsors of the new criminal code in the Ohio legislature; that code includes the capital punishment statutes here under attack.

The lack of discretion in the sentencing authority, coupled with the narrowness of the statutory mitigating circumstances, together with the even narrower construction of the statutory mitigating factors by the Ohio Supreme Court, have created, for all practical purposes, a mandatory death penalty process in Ohio, with one limited exception—that the offender's psychosis or mental deficiency is a primary cause of the offense.

Any other offender convicted of aggravated murder and a specification of an aggravating circumstance has no meaningful chance to survive the sentencing process.

The first Ohio mitigating factor, that the victim of the offense induced or facilitated his own aggravated murder, will rarely, if ever, be applicable. It must be recalled that one of the aggravating circumstances must be present in order for the mitigating fact to be important, as without the aggravation, the homicide is not a capital offense. Except in the rarest and most improbable factual situations, there is a basic inconsistency between any of the aggravating circumstances and this first mitigating circumstance to the extent that the existence of the aggravating circumstance will negate the existence of the mitigating circumstance. Thus, the first mitigating circumstance is practically inconsequential.

The second mitigating circumstance, that it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion or strong provocation is also essentially illusory. Whereever these factors exist, they constitute defenses to the capital charge itself. Either duress or coercion is a complete defense to the charge; and strong provocation is grounds for an acquittal of aggravated murder and a conviction of the lesser offense of voluntary manslaughter.[5] The Ohio Supreme Court, in *State v. Woods*, 48 Ohio St.2d 127, attempted to salvage part of the second mitigating circumstance from total absorption by the traditional defenses by construing the words "duress" and "coercion" to mean domination by another, or undue influence,

[5]Under R.C. 2903.03, voluntary manslaughter is the knowing killing of another "while under extreme emotional stress brought on by serious provocation sufficient to incite him into using deadly force."

48 Ohio St.2d at 126-137, but this reformulation has given the mitigating circumstance no broader effect. To date, the Ohio Supreme Court has reviewed two capital cases in which there was evidence of domination of the offender by others involved in the homicide: *Woods,* and this case, *Bell.* In each case, that Court acknowledged that the offender was dominated by others, but affirmed the death penalty because each offender had an opportunity to quit the venture before the homicide, and did not do so. By invoking the doctrine of withdrawal to defeat a claim of the existence of the mitigating fact of duress or coercion, the Ohio court has negated completely the softening of the definition of those factors set forth in *Woods,* thereby rendering the factors meaningless. The doctrine of withdrawal functionally limits this kind of mitigation, despite its verbal redefinition, to the same kind and degree of coercion that constitutes a defense to the offense itself.[6] Practically, therefore, a conviction of aggravated murder will preclude the trier of the fact at the penalty trial from finding that duress or coercion are present as a mitigating circumstance.

No reported case from the Ohio Supreme Court has yet construed the meaning of "strong provocation" as used in the Ohio capital statute, but, as we have indicated, the finding of such provocation will constitute a reductive fact which will reduce the offense from capital murder to voluntary manslaughter. Its inclusion as a mitigating factor will also be useless, as it will never be utilized under any foreseeable fact situation. To prove the mitigating circumstance is to prove a defense to the capital crime itself.

As to the third mitigating circumstance, that "the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the

[6]In *Woods*, the Court held that as mitigation, duress or coercion had to be such as to "overcome the mind or will of the defendant so that he acted other than he ordinarily would have in the absence of those influences." Overcoming the will to resist and the acting of the defendant against his will are defenses to the charge, and, if proved, constitute a defense to the crime itself, negating as they do the implicit element of *mens rea*.

defense of insanity," the Ohio Supreme Court has also attempted to soften the definition so that it is now swallowed up by the traditional defense of insanity.[7] The result has been to produce an exceedingly narrow all-or-nothing mitigating circumstance which precludes the death penalty absolutely if it is found to exist, but which can almost never be found as a matter of fact. Apart from this extreme state, the defendant's mental condition may not be considered at all as part of the capital sentencing process. .

A psychotic offender will qualify for mitigation only if the offense is somehow "primarily the product of [his] . . . psychosis" but is not connected with the psychosis in any of the ways that support Ohio's insanity defense under *State v. Staten,* note 7 *supra.* Mental deficiency having the same kind of causal relation to the offense will also qualify in theory; but the term "mental deficiency" is not defined by statute and its judicial construction has rendered it either meaninglessly narrow or completely lacking in meaning. In *State v. Bayless,* 48 Ohio St.2d 73, at 87, 95-6, the Ohio Supreme Court defined mental deficiency as "a low or defective state of intelligence." In support of this definition, it cited *Blackiston's New Gould Medical Dictionary* to the effect that "In civil law, the condition is defined by statute as frequently divided into three grades: idiocy, the lowest; imbecility, the intermediate; and moronity, the highest." The Ohio court in *Bayless* also relied on the definition in *Schmidt's Attorney Dictionary of Medicine:* "In law, mental deficiency is usually divided in three grades: idiocy, imbecility and moronity. Idiocy is the most severe form, moronity the highest."

The Ohio Supreme Court's limitation of mental deficiency to these three categories is significant. A moron is defined as a feebleminded person whose mental age is between 8 and 12 years, an imbecile is one whose mental age is between 2 and 7 years and

[7]Ohio's insanity defense is that one is not responsible for criminal conduct if, "at the time of the crime, as the result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law." *State v. Staten,* 18 Ohio St.2d 13 (1969).

an idiot is such a person whose mental age is below 2 years. *Dorland's Illustrated Medical Dictionary,* 23rd Ed. (Saunders, 1957). In I.Q. figures, a moron's I.Q. is beween 50 and 70, an imbecile's beween 20 and 50, and an idiot's I.Q. is between 0 and 20. Chaplin: *Dictionary of Psychology,* New Rev. Ed. (Laurel, 1975). Thus, in its first capital case, the Ohio Supreme Court construed the only statutory mitigating circumstance dealing with the personal characteristics of the offender as mandating death unless he is psychotic or is a retarded person with a mental age of less than 12, and an I.Q. of less than 70. And, as the Court recognized, under the terms of the statute, psychosis and mental deficiency even if found to exist under these narrow definitions will not preclude the imposition of the death penalty unless that mental aberration is the primary cause of the offense, 48 Ohio St.2d at 96.

Then, a month later, in *State v. Black,* 48 Ohio St.2d 262, 358 N.E.2d 551, the Ohio Supreme Court softened its definition somewhat and held that "any mental state or incapacity may be considered. *Id.* at 268, but then refused to define what it meant because "*to define terms such as those used in the statute is to narrow them*" [!] *Id.* It reiterated, however, that even psychosis or whatever it meant by "mental deficiency" would not preclude the death penalty unless it was the primary cause of the offense. 48 Ohio St.2d at 268.

In our case, the Court stated that age (senility as well as youth) was a primary factor in determining mental deficiency, but rejected Petitioner's contention that by age alone he was as a matter of law, mentally deficient, and upheld the death sentence rendered against this 16 year old offender.

The Ohio Supreme Court, in two cases decided on December 27, 1976, made it clear that, whatever the meaning of its language in *Black,* it was not about to retreat from the narrow, restrictive interpretation it had placed on "mental deficiency" in *Bayless.*

In *State v. Harris,* 48 Ohio St.2d 351, 359 N.E.2d 67, the Court upheld the death sentence for a juvenile defendant who was, it conceded, a recognized sociopath. In that case, it is interesting to note that in rejecting the contention that the offense was primarily the product of mental deficiency in that the offender was a drug

addict, the Ohio court cited the fact that the record was devoid of evidence that the defendant was under the influence of drugs when the offense was committed. In our case, evidence at the penalty trial clearly established that Petitioner *was* under the influence of drugs at the time of the offense. That fact, however, made no difference to the Ohio courts.

In *State v. Royster,* 48 Ohio St.2d 381, 358 N.E.2d 616, the Court upheld the death sentence for an offender whose I.Q. was measured at 75 in 1962, 61 in 1966, and 54 in 1968, apparently indicating the offender was retrogressing through the range of moronity and approaching imbecility. However, Royster's sentence was upheld because ". . . the testimony of the psychiatrists did not equate I.Q. with mental deficiency."[8] 358 N.E.2d at 622. By thus rejecting the use of I.Q. as determinative of the existence of mental deficiency, the Ohio Supreme Court undercut the rationale behind its own extremely narrow definition of that term. It thereby affirmed Royster's death sentence.

In *State v. Edwards,* 49 Ohio St.2d 31, 358 N.E.2d 1051, the Ohio Supreme Court refused to equate mental deficiency with educational deficiency. And in *State v. Weind,* 50 Ohio St.2d 224,____N.E.2d____, the Court upheld a capital sentence where one of the psychiatrists originally stated that the defendant was psychotic at the time of the offense, but could not so state to a reasonable medical certainty although there was, he later testified, a "possibility of an acute break" at the time of the crime, *Id.* at 232.

We cannot overemphasize the fact that the mitigating factor involving psychosis or mental deficiency as the primary cause of the offense is the only Ohio mitigating circumstance which involves the characterisics of the offender as opposed to the circumstances of the crime. Yet even this mitigating fact includes a significant qualification that has to do with the offense rather than the offender: the offense must be primarily caused by the mental

[8]The psychiatrist did say that the decrease in I.Q. scores was due to "developing characteristic traits" and the defendant's "unwillingness to cooperate with the examiner", but we wonder how he could have so concluded as to tests given as long before as 15 years.

condition of the offender. Thus, even a moron, imbecile or idiot may be put to death in Ohio where it does not appear to a preponderance of the evidence that his mental condition was a *primary* cause of the offense.

* * * * * * * * *

Viewed from the perspective of the three statutory circumstances that are recognized as mitigating, Ohio's capital sentencing scheme thus operates for all practical purposes as a mandatory death penalty statute. The "mitigating circumstances" are not factors to be weighed in the exercise of a focused sentencing discretion, but define an exceedingly narrow set of conditions — almost never found in fact — under which the death sentence is precluded with the same mechanical rigidity with which it is required to be imposed in all other cases of aggravated murder. Realistically, the only offenders who can survive the sentencing process are extremely abnormal cases: psychotics and extreme mental retardates whose mental condition is a primary cause of the offense. Every other capital offender (excepting those in a few hypothetically definable but factually implausible situations) must be sentenced to die. This fact is underscored by the fact that the Ohio Supreme Court, interpreting the mitigating facts as narrowly as possible, has affirmed *every* capital sentence to date where the conviction on which that sentence is based was upheld.

But there is another, equally important perspective from which the Ohio statutes should be examined: the perspective of the circumstances which are *not* recognized as mitigating. This perspective, to which we now turn, emphasizes the extent of Ohio's failure to accord to capital defendants the individualized sentencing determination which this Court has held to be required by the Eighth and Fourteenth Amendments.

B. THE OHIO CAPITAL SENTENCING STATUTES PRECLUDE THE MEANINGFUL CONSIDERATION OF THE CHARACTER AND RECORD OF THE OFFENDER AS PART OF THE CAPITAL SENTENCING PROCESS.

This Court has emphasized the importance of considering the character and record of the offender among the particularized mitigating factors which must constitutionally be taken into account in any capital sentencing determination. Such consideration is a "constitutionally indispensible part of the process of inflicting the penalty of death," *Woodson v. North Carolina, supra.*, 428 U.S. at 304.

The Ohio statutory scheme for the imposition of the death penalty, by its very nature, affirmatively precludes consideration by the sentencing authority of those essential factors as part of the sentencing process. It is true that the statutory language makes reference to the history, character and condition of the offender, as well as the circumstances of the offense; and the Ohio Supreme Court relied upon this language in sustaining the constitutionality of the statute in *State v. Bayless, supra.*, 48 Ohio St.2d at 86. But it is critical to note precisely what the statute says, and what the Ohio Supreme Court confirmed in *Bayless* and all subsequent cases that the Ohio statute requires, in regard to the specific and limited purpose for which the offender's background is to be used: R.C. 2929.04 (B), the sole provision referring in any way to offender-related factors, provides that:

> . . . the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense, and the history, character, and condition of the offender, one or more of the following [three enumerated mitigating circumstances] is established by a preponderance of the evidence (Emphasis added).

What follows, of course, is the specification of the three factors previously discussed: victim inducement, duress/coercion/provocation, and psychosis or mental deficiency primarily causing the offense. It is those three factors, and those three alone, which may be considered in determining whether the death penalty shall

be imposed. The direction of the statute to the sentencing authority to consider the offender's background is a direction to cull from that background only such evidence as is relevant and material in the determination of whether any of the three narrow statutory mitigating facts exists.

Everything else in the character and record of the offender, and, indeed, facts pertaining to the circumstances of the offense, is excluded from sentencing consideration. As a result, virtually the whole of the offender's history and those characteristics and attributes which make him an individual human being must be ignored. In *Stanislaus Roberts v. Louisiana, supra.*, 428 U.S. at 333, this Court emphasized that the consideration to be given by the sentencing authority in a capital case to the character and record of the offender must be *meaningful.* Capital sentencing statutes which are so rigid as to forbid meaningful consideration of the character and record of the capital offender in the sentencing process are unconstitutional because they treat "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson v. North Carolina, supra.*, 428 U.S. at 304.

Ohio's statutes are as rigid and blind as those from Louisiana and North Carolina, since the three enumerated circumstances on which the ultimate Ohio sentencing decision depends are such that the character and record of the individual offender have almost nothing to do with whether or not any of those mitigating circumstances exist, and, ultimately, have almost nothing to do with whether the offender lives or dies.

Specifically, the character and record of the offender have nothing to do with whether or not the victim induced or facilitated his own demise. Either he did or he did not, and whether the offender had a good or bad character, or prior record, will not have any meaningful impact on the decision as to whether the victim actually indiced his own death at the hands of the accused.

Similarly, only minor fragments of the character and record of the offender can have any relevance or materiality in enabling the

sentencing authority to determine whether the offender was acting under duress, coercion or strong provocation. This second mitigating circumstance involves a situation existing at the time and place of the crime. One with good character and no prior criminal record is not more likely, because of his character or record, to be susceptible to duress, coercion or provocation than is one with a bad character and/or a poor record. Indeed, logic indicates the opposite to be true, in which case, the good character and absence of a criminal record could cost the offender his life.[9] The vastly larger part of an offender's character and record simply has nothing to do with whether or not the mitigating circumstance can be established.

Finally, the determination whether the primary cause of the offense was the psychosis or mental deficiency of the offender involves an inquiry into an extremely narrow and isolated aspect of the offender's psyche, excluding the whole remainder of his character and record from meaningful consideration. One who has no prior record and is of good character may or may not be psychotic or mentally deficient, and even the presence or absence of psychosis or mental deficiency is irrelevant to the capital decision in Ohio unless such mental condition was the primary cause of the offense. Here too the good character and lack of a record probably tends more in the usual case to negate the mitigation rather than to establish it. Thus, [illegible]plary past is likely to cost the offender his life.[10]

[9]In fact, one with a good character and no criminal record would be *less* likely to succumb to improper coercion or duress, and less likely to lose control in the face of provocation to such an extent that he would take the life of another under circumstances which would amount to aggravated murder under Ohio law. In such a case, the offender would be *penalized* for his good character and absence of a prior record, as those circumstances would make it less likely that the mitigating circumstance would be found to exist. His prior good character and absence of prior record would cost him his life.

[10]Assuming that psychotics and mental deficients would have more contacts with law enforcement, and more character defects than normal citizens, the logic contained in note 10 would apply equally here – good character and absence of prior criminal activity would make it less likely rather than more likely that the offense was a product of psychosis or mental deficiency, with the same result – the good character and absence of a record would tend to negate existence of the mitigating circumstance and would cost the offender his life.

It is clear that, under the Ohio capital sentencing scheme, the history, character and condition of the offender may be utilized solely in the determination of whether any of the statutory mitigating factors exist. Since the vastly larger part of the offender's history, character and condition — virtually everything that makes him a unique and individual human being — has nothing to do with the existence of the three statutory mitigating factors, the personalized characteristics of the offender cannot be considered meaningfully in the capital sentencing process, which the Constitution requires, *Woodson, supra.*, 428 U.S. at 304. An examination of the 26 capital cases decided to date by the Ohio Supreme Court reveals that, while the character and record of the offender may be discussed occasionally by that Court, there is no case among them in which the character and record of the offender has had any meaningful impact upon the ultimate life or death decision. We submit that, if for no other reason, the absence of *meaningful* consideration of the character and record of the offender in Ohio's capital sentencing process renders the Ohio capital punishment statutes unconstitutional. Their preclusion of consideration of the individual attributes and characteristics of the offender is strikingly demonstrated in Petitioner's case, as we shall next illustrate. Certainly as applied to him (Cf. *Chambers v. Mississippi,* 410 U.S. 284 [1973]), the statutes forbade consideration of sentencing factors that must constitutionally be considered if the infliction of the death penalty is to be kept consistent with "contemporary standards of decency," *Woodson v. North Carolina, supra.*, 428 U.S. at 296.

C. MANY MITIGATING FACTORS CONSIDERED BY THIS COURT AND BY OTHER JURISDICTIONS AS IMPORTANT FACTORS IN THE CAPITAL SENTENCING PROCESS ARE APPLICABLE TO PETITIONER BUT ARE FORECLOSED TO HIM UNDER OHIO LAW.

In *Gregg v. Georgia, supra.*, 428 U.S. at 197, this Court indicated some mitigating circumstances which would "mitigate against imposing capital punishment:"

> Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (*e.g.*, his youth, the extent of his cooperation with the police, his emotional state at the time of the crime.)

In *Harry Roberts v. Louisiana,* ____ U.S. ____, 97 S. Ct. at 1996, the Court stated:

> Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.
>
> As we emphasized repeatedly in [Stanislaus] *Roberts* and its companion cases decided last Term, it is essential that the capital sentencing decision allow for consideration of *whatever mitigating circumstances* may be relevant to either the particular offender or the particular offense. [Emphasis added]

Of the several mitigating circumstances cited by the Court in *Gregg* and *Harry Roberts*, all but the last apply to Petitioner, and all of those are foreclosed from consideration by the sentencing authority under Ohio law:

1. *Prior capital offenses:* Petitioner has no prior convictions for capital offenses [A.50]; 2. *Youth:* Petitioner was 16 years of age at the time of the offense for which he stands condemned to death [A. 72]; 3. *Extent of his cooperation with police:* Petitioner voluntarily submitted to questioning at the investigatory stage, and, even after receiving *Miranda* warnings, gave a statement to police admitting the facts of the case. The officer who took the statement described Petitioner as "cooperative" [R. 95]; 4. *His emotional state at the time of the crime:* Petitioner was, at the time of the crime, emotionally unstable, either by adulty standards or by standards of normality for youths of his age [A. 84, 87, 91] (see also the probation department report [A. 58-91]; 5. *The influence of drugs:* Petitioner had used drugs on a daily basis for

about three years preceding the offense herein [A. 74-76]; he was described by three of his teachers as constantly on drugs, including during the week between the offense herein and his arrest [A. 82-92]; he told the psychiatrists that the best thing that ever happened to him was "when he gets high," [A. 39].

The five mitigating facts set forth above are all facts which this Court, in recent decisions, has stated are important enough to merit consideration in the capital sentencing process. All are applicable to Petitioner. None have any meaningful effect on the decision of whether he shall live or die, because of the narrowness of the Ohio statutory mitigating circumstances. This Court has stated that these factors should make a difference. Here, they did not because under Ohio's statutes they could not.

The Model Penal Code recommends no less than eight mitigating circumstances, including several applicable to Petitioner but also unavailable under Ohio law: youth; no significant history of prior criminal activity; the defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor; the accused acted under domination of another person, and, at the time of the offense, the capacity of the accused to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of . . . intoxication. *Model Penal Code* §210.6 (Proposed Official Draft, 1962). These circumstances are also set forth in the Appendix in *McGautha v. California,* 402 U.S. 183, at page 225. It was stated in the probation report that Petitioner was under the influence of the codefendant, Hall [A. 60]. The Ohio Supreme Court admitted as much in its opinion, 48 Ohio St. 2d at 282 [A. 142]. He was under the intoxicating influence of drugs the night of the offense and stated at the penalty trial that his ability to resist Hall's domination was hampered by the drugs. [A. 79-80]

This Court's recognition that, under contemporary standards of morality, not " 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a

particular offender,' "[11] is confirmed by the record of capital legislation enacted since July of 1976. The most recently passed death penalty statutes have commonly allowed consideration of any circumstance deemed mitigating by the sentencer,[12] and have in no case defined mitigating factors as restrictively as did the Ohio legislature.[13] Taken together with eleven pre-*Gregg* statutes still in effect which either allow consideration of any mitigating circumstance[14] or a broad range of specified factors,[15] the severe

[11]*Stanislaus Roberts v. Louisiana, supra,* 428 U.S. at 333 (plurality opinion).

[12]Del. Code §4209(c) (1977 amendment); Idaho Code §19-2515(c) (as amended by 1977 Idaho Sess. Laws ch. 154, §4); Smith-Hurd Ill. Ann. Stat. c.38 §9-1(c)(1977 amendment); Burns Ind. Stat. Ann. §35-50-2-9(c)(7)(1977 amendment); Baldwin's Ky. Rev. Stat. §632.025(2) (as amended by c.15 H.B. 14 Ky. Laws of 1976); La. Code Crim. Pro. Ann., Art. 905.5 (1977 cum. ann. pocket part); Miss. Code of 1972 §97-3-21(2) (1977 amendment); Rev. Stat. Mo. ch. 559, as amended by House Bill No. 90, 79th Gen. Ass. (1st Reg. Sess.), §5.1(3) (1977); Nev. Rev. Stat. ch. 200, as amended by Laws of Nev. ch. 585, §4.7 (59th Sess., approved May 17, 1977); N.C. Gen. Stat. Art. 100, §15A-2000(f)(9), as added by Gen. Ass. Ratified Bill ch. 406 (1977); Okla. Stat. Ann. §701.10 (1976 cum. pocket part); S.C. Code of 1962 §16-52(C) (1977 amendment); Tenn. Code Ann. §39-2404(j), as amended by ch. 51 Public Acts, 1977 (enacted April 11, 1977); Va. Code Ann. §19.2-264.3(B) (1977 amendments ch. 492); Wash. Rev. Code Ann. §9A.32.045(2), as amended by ch. 206, Laws of 1977 (enacted June 10, 1977).

[13]Of the fifteen states which have recently passed statutes allowing any mitigating factor to be considered, cited in note 12, *supra,* all but four (Delaware, Idaho, Mississippi and Oklahoma) additionally provide broad rosters of mitigating circumstances similar to the Model Penal Code.

A sixteenth state, Wyoming, does not appear to allow consideration of any mitigating circumstance but does provide a substantial roster of the sort contained in the Model Penal Code, Wyo. Stat. §6-54.2(c), (d) and (j), as enacted by Enrolled Act No. 42, Senate, 44th Legislature of the State of Wyoming, ch. 122 (1977 Session).

[14]Ga. Code Ann. §27-2534.1(b)(1974 cum. pocket part); Mont. Rev. Codes Ann. §94-5-105(1) (1974 interim supp. part 3); Vernon's Texas Code Crim. Proc. Ann., Art. 37.071(b)(2) (see *Jurek v. Texas, supra,* 428 U.S. at 272-73); Utah Code Ann. §76-5-202(1)(g) (1975 cum. supp.).

[15]Code of Ala. Recompiled, tit. 15, 342(9) (1975 interim supp.); Ark. Code §41-1304 (1975 special supp.); Colo. Rev. Stat. 1973, §16-11-103(5) (1976 cum. supp.); Conn. Gen. Stat. Ann. §53a-46a(f) (1976 cum. pocket part); Fla. Stat. Ann. §921.141(6)(1976 cum. pocket part); Nebr. Rev. Stat. §29-2523(2) (1975); 49 U.S.C.A. §1473(c)(6) (1976).

narrowness of Ohio's death sentencing scheme is readily apparent.

For example, all of the statutes cited in notes 12-15, *supra,* either require or at least permit consideration of the defendant's age; indeed, four actually preclude execution of a youth such as petitioner who is under the age of eighteen.[16] All either require or at least permit consideration of a broad range of mental or emotional disturbance or other limitations upon the defendant's capacity to appreciate the wrongfulness of his conduct at the time of the offense, instead of limiting mitigation to an outgoing condition reaching the level of psychosis or retardation.

In the following subsection of this brief, we shall demonstrate that the death penalty imposed on Petitioner is a cruel and unusual punishment because it is grossly disproportioned and excessive in light of all of the facts of his case. Petitioner's death sentence is excessive because it was inflicted upon him for the crime of homicide committed by another person, without any finding that he deliberately intended or actively participated in the victim's death. It is yet more excessive because Petitioner was a 16 year-old, emotionally immature, drug-dependent youth at the time of the offense. But, surely, whether or not the Eighth and Fourteenth Amendments would ever permit the sentence of death to be imposed in a case of this sort, the constitutional requirement of individualized sentencing consideration that this Court has found necessary to assure "reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina, supra.*, 428 U.S. at 305, and that sentences of death "accord with 'the dignity of man,' " *Gregg v. Georgia, supra.*, 428 U.S. at 173, forbid executing this Petitioner under a death sentence imposed through a procedure that *precluded his sentencer from giving any consideration to any of these factors in the determination of whether he should live or die.*

[16]Colo. Rev. Stat. 1973, §16-11-103(5)(a) (1976 cum. supp.); Conn. Gen. Stat. Ann. §53a-46a(f)(1) (1976 cum. pocket part); Smith-Hurd Ill. Ann. Stat. c.38 §9-1(b) (1977 amendment); 49 U.S.C.A. §1473(c)(6) (1976). To the same effect, see former Cal. Penal Code §190.3 (1977 cum. pocket part); former N.M. Stat. Ann. §40A-29-2 (1975 supp.); N.Y. Penal Law §125.27 (1976 cum. supp.) (mandatory statute still technically in force).

D. IMPOSITION OF THE DEATH PENALTY UPON A 16 YEAR OLD OFFENDER, WHO IS EMOTIONALLY IMMATURE, DISTURBED AND DRUG DEPENDENT, AND WHO HAS NOT BEEN FOUND TO HAVE INTENDED OR PARTICIPATED IN THE HOMICIDAL ACT FOR WHICH HE STANDS CONVICTED IS GROSSLY DISPROPORTIONATE AND OFFENDS THE CONTEMPORARY STANDARDS OF DECENCY EMBODIED IN THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

For years it has been axiomatic that "punishment for crime should be graduated and proportioned to offense." *Weems v. United States,* 217 U.S. 349, 366-7 (1910). In *Gregg v. Georgia, supra.*, this Court held that excessive punishments are unconstitutional where such punishment "(1) makes no reasonable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." *Coker v. Georgia,* ____ U.S. ____, 97 S. Ct. 2861, 2865 (1977). The Court concluded in *Gregg* that "the death penalty for *deliberate* murder was neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime," *Id.* [Emphasis added]. *Coker,* on the other hand, held the death penalty excessive for the non-homicidal crime of rape.

This Court's decisions have looked to certain objective indicators in appraising the evolving standards of decency of our society, which speak to the question of excessiveness of the death penalty in particular situations. It has examined, for example, the frequency with which the death penalty was meted out or exacted in fact, the legislative response of the states in enacting new capital punishment statutes after the decision in *Furman, supra.* See *Gregg v. Georgia, supra., Woodson v. North Carolina, supra., Coker v. Georgia, supra.*

While it is true that non-triggermen, lookouts, getaway car drivers, etc., have sometimes been sentenced to death,[17] these persons have almost never been actually executed in recent decades. A search of all reported appellate opinions in post-1954 cases of execution for homicide reveals only six cases out of 362 in which clearly identifiable felony murder non-triggermen were executed. The last such execution occurred in 1955, twenty-two years ago.[18] By comparison, there have been 72 executions for rape in this country since 1955.[19] Thus, it is apparent that executions for homicides not clearly committed by the person executed have been a good deal less prevalent in this country than the practice declared unconstitutional in *Coker v. Georgia, supra.* Looking as this Court did in *Coker* to "guidance in history and from the objective evidence of the country's present judgment," *Id.* at 4963, one finds that the death penalty for non-triggermen is today virtually extinct.[20]

---

[17]We are aware of several in our own jurisdiction, Hamilton County, Ohio, both prior to and after the decision in *Furman.* In *State v. Lockett,* 49 Ohio St. 2d 48, and *State v. Bates,* 48 Ohio St. 2d 315, the Ohio Supreme Court affirmed death sentences for offenders who did not participate in the slaying for which they were convicted. These results under the present Ohio statute, however, say nothing about the willingness of sentencers to inflict the death penalty upon non-triggermen, since the statutes themselves forbid consideration of a convicted offender's possible lack of participation by the sentencing authority.

[18]This survey was conducted by searching for reported opinions in all post-1954 cases of executions for homicide listed in the inventory in Bowers, *Executions in America* 200-401 (1974). The complete survey, including citation of all 362 cases found, is set forth in Appendix A of this brief.

In addition to six clearly identifiable non-triggermen, the survey found two non-felony murders where the executed person had others commit the homicide for him, and eight other cases where the facts were not reported in sufficient detail to determine whether the executed person was a non-triggerman.

[19]UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, National Prisoner Statistics Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974* (November 1975) 16-17.

[20]In Florida, there have been several decisions explicitly rejecting the death penalty in cases of non-triggermen. See *McCaskill v. State,* 344 So. 2d 1276, 1280 (Fla. 1977), and cases cited therein; see also *Slater v. State,* 316 So. 2d 539 (Fla. 1975) and *Taylor v. State,* 294 So. 2d 648 (Fla. 1974).

Examining the actions of state legislatures, it is apparent that Ohio stands alone in its refusal to recognize a minor degree of participation as mitigating. Of the jurisdictions which now have death penalty statutes, five would preclude petitioner's execution,[21] sixteen others specify that a minor degree of participation be considered[22] and the remaining eight allow consideration of any mitigating factor.[23] Not a single state has followed Ohio in excluding minor participation as a mitigating factor.[24] Clearly, the evolving standards of decency in this nation as embodied in the Eighth Amendment require that minor participation in the homicidal act be at least considered by the sentencing authority in the capital sentencing process.

[21]Colo. Rev. Stat. 1973 §16-11-103(5)(d) (1976 cum. supp.); Conn. Gen. Stat. Ann. §53a-46a(f)(4) (1976 cum. pocket part); Smith-Hurd Ill. Ann. Stat. c.38 §9-1(b)(6)(a) (1977 amendment); 18 Pa. C.S.A. §§1102 and 2502 (1977 cum. ann. pocket part) (death penalty precluded for both principals and accomplices in felony murder); 49 U.S.C.A. §1473(6)(D) (1976).

[22]Code of Ala. Recompiled, tit. 15, §342(9)(d) (1975 interim supp.); Ariz. Rev. Stat. §13-454(F)(3) (1973 supp. pamphlet); Ark. Code §41-1304(5) (1975 supp.); Fla. Stat. Ann. §921.141(6)(d) (1976 cum. pocket part); Burns Ind. Stat. Ann. §35-50-2-9(c)(4) (1977 amendment); Baldwin's Ky. Rev. Stat. §532.025(2)(b)(5) (as amended by c. 15 H.B. 14 Ky. Laws of 1976); La. Code Crim. Pro. Ann., Art. 905.5(g) (1977 cum. ann. pocket part); Rev. Stat. Mo. ch. 559, as amended by House Bill No. 90, 79th Gen. Ass. (1st Reg. Sess.), §5.1(3)(4) (1977); Nebr. Rev. Stat. §29-2523(2)(e) (1975); Nev. Rev. Stat. ch. 200, as amended by Laws of Nev. ch. 585 §4.4 (59th Sess., approved May 17, 1977); N.C. Gen. Stat. Art. 100, §15A-2000(f)(9), as added by Gen. Ass. Ratified Bill ch. 406 (1977); S.C. Code of 1962 §16-52(C)(v)(4) (1977 amendment); Tenn. Code Ann. §39-2404(j)(5), as amended by ch.51 Public Acts, 1977 (enacted April 11, 1977); Utah Code Ann. §76-3-207(1)(f) (1975 cum. supp.) Wash. Rev. Code Ann. §9A.32.045(2), as amended by ch. 206, Laws of 1977 (enacted June 10, 1977); Wyo. Stat. §6-54.2(c),, (d) and (j)(iv), as enacted by Enrolled Act No. 42, Senate, 44th Legislature of the State of Wyoming, ch. 112 (1977 Session).

[23]See statutes of Delaware, Georgia, Idaho, Mississippi, Montana, Oklahoma, Texas and Virginia cited in notes 12 and 14, *supra*.

[24]We except from this analysis the mandatory death sentencing statutes of New Hampshire, New York and Rhode Island which, although technically still in force, are of highly doubtful validity in light of this Court's recent decision in *Harry Roberts v. Louisiana, supra.*, N.H. Rev. Stat. Ann. 1974, §630.1 (1974); N.Y. Penal Law §§60.06, 125.27 (1976 cum. supp.); R.I. Gen. Laws 1956, §11-23-2 (1976 supp.)

While the death penalty for deliberate murder is not unconstitutional, *Gregg v. Georgia, supra*, we submit that in the case of an accomplice who does not intend, nor participate in, the act of killing, nor even know in advance of the killer's intentions, his participation, such as it is, is not "deliberate murder" within the purview of the *Gregg* series, and is grossly disproportionate to his actual involvement in the offense. The death penalty makes no reasonable contribution to acceptable goals of punishment, *Coker v. Georgia, supra.* The culpability of the offender must be considered even where the death penalty is sought to be inflicted for murder, and the offender has not been proved to have been the actual killer nor to have participated in the offense.

While Ohio has not been traditionally a felony murder state, a divided Ohio Supreme Court, in *State v. Lockett*, 49 Ohio St. 2d 48, has decided that an accomplice to a felony may be invested vicariously with the homicidal intent and participation of the principal offender who commits aggravated murder after the felony in which the accomplice was involved has commenced, irrespective of the accomplice's lack of knowledge that murder would be committed, and his lack of approval and participation in the actual killing. Lockett's death sentence was affirmed in that case.

The failure of the Ohio statutory scheme to focus on the presence or lack of homicidal intent, and participation by the accomplice-offender in the killing, by failing to make lack of homicidal intent and participation in the offense a mitigating circumstance rises to a constitutional infirmity in light of the Court's decisions in *Gregg*, affirming the constitutionality of the death penalty in a deliberate murder situation, and in *Coker*, holding that death is grossly out of proportion as a penalty for rape alone. An accomplice in a felony which culminates in a murder he did not intend, approve, or participate in, is not guilty of "deliberate murder" as this Court used that term in *Gregg*; at the most, his intent was to participate in a felony. We do not maintain that a state may not punish an offender more severely when the felony in which he is involved results in the death of an innocent victim; such an offender may properly be convicted of

felony murder if the State chooses to make felony murder without specific homicidal intent on the part of the offender a crime. What we do contend is that the Constitution will not permit the taking of his life by the State where he has not been clearly shown to have intended or participated in the killing of the victim. Such a penalty for such limited participation in a homicide is grossly disproportionate to the offender accomplice's involvement in the killing.

Under the Ohio statutes, the trier of the fact at the penalty trial is precluded from giving any consideration whatsoever to the degree of the offender's participation in the homicidal act nor to his homicidal intent, if any. Therefore, no specific finding of fact as to this important circumstance being required, none is made. In our case, the three-judge trial court simply never focused upon, or resolved, the factual question of the extent of Petitioner's involvement in the events leading to the death of Julius Graber. However, a dispassionate consideration of the record reveals no substantial or credible evidence upon which it can be reliably concluded that Petitioner intended or actively participated in the homicidal act for which he stands condemned to death. A brief summary of the evidence follows:

Other than Petitioner's statement,[25] which is exculpatory as to homicidal intent and participation, the evidence concerning Petitioner's involvement is circumstantial, and meager: the existence of his fingerprint on the *outside* glass of Mr. Graber's auto, which is not indicative of participation in any of the events of October 16, 1974, and particularly not indicative of any homicidal intent or participation. See *United States v. Collon*, 426 F.2d 939 (6 Cir. 1972).

The testimony of witness Pierce that he heard two doors slam before the car left the cemetery service drive was offered to

[25]Both appellate courts below stated that there was nothing to require the trier of the fact to believe any, all or part of Petitioner's statement. With this we must agree. However, we cannot agree with their assumption that to disbelieve a statement of a witness or defendant permits the trier of the fact to conclude that the opposite of that statement has been proved, especially where, as here, it must be proved beyond a reasonable doubt.

combat a straw man the State itself set up: that Petitioner's assertion that he had not left the auto was thereby contradicted. There are two problems with the State's "theory". First, Petitioner never maintained in his statement that he remained inside the auto — only that he did not accompany Hall and Mr. Graber on their fatal walk up the service drive into the dark woods. Secondly, the fact that Pierce heard two doors is not necessarily inconsistent with the theory that Petitioner remained in the auto, as the trunk of the auto would have made similar noises as it opened and closed. What Pierce heard could have been one door and the trunk, as opposed to two doors.

The State, in its opening statement [R. 130] insisted that the glancing face wound received by Mr. Graber was inflicted as he attempted to run from the gun-wielding assailant, and the other defendant then had to run after and subdue Mr. Graber, inflicting bruises on the unfortunate victim's body [A. 130-1]. The State's own witness, Deputy Coroner Jolly, destroyed this theory completely. Because of the narrowness of the face wound and the fact that it was inflicted by a sawed-off shotgun, which spreads its pattern of shot quickly, the coroner testified the victim was only one or two feet from his assailant when the first, wounding, shot was fired, indeed, "within arm's length," [R. 383-4], negating the theory that the first shot was fired as Mr. Graber fled. Further, the coroner could not identify a source or cause of the bruises which appeared on Mr. Graber's body [R. 388]. It would seem as reasonable that the bruises were inflicted while the victim was being jostled around in the trunk of his auto, and especially when it proceeded up the rocky service drive.

The State conceded in final argument that it did not know who pulled the trigger [A. 466-7], although still insisting that the other defendant held the victim down.

We submit that this evidence wholly fails to establish that Petitioner intended, or participated in, Mr. Graber's death. If, as we contend, the Eighth Amendment prohibition of disproportionate and excessive punishment precludes the death penalty for murder where the offender was an accomplice in a murder committed by another person and the offender's participation in

the homicidal act was relatively minor, Petitioner's death sentence cannot constitutionally be affirmed.

Of course, the Court need not reach that question here. For, in addition to the attenuated nature of Petitioner's involvement in the killing of Mr. Graber, other circumstances that are uncontested in this record make the imposition of the death penalty in this case grossly and manifestly excessive. We have detailed those circumstances in Part I(C), *supra*, and we submit, in summary, that death is a disproportioned and constitutionally impermissible penalty for (a) a 16 year old youth, who is (b) emotionally immature and (c) drug dependent, who (d) cooperated fully with the police following his apprehension for (e) accessorial liability in a homicide committed by another person, which he is not found to have intended or actively assisted.

Finally, we challenge the application to this Petitioner of the Ohio death-sentencing process which did not even permit his sentencers to consider Petitioner's relative lack of personal culpability for the killing of Julius Graber by Samuel Hall, or any of the other mitigating circumstances that we have identified above because the narrowness of the statutory mitigating factors actually precluded such consideration. While we maintain that death should be precluded as a penalty for aggravated murder where the offender does not intend nor participate in the death of the victim, the sentencing authority should at the very least be permitted to consider this fact in determining the fate of the accused. As stated previously, Ohio is the only state with the death penalty which precludes consideration of this factor, except a few states with mandatory statutes. Ohio is thus as unique constitutionally as was Georgia in prescribing death as a penalty for rape, *Coker v. Georgia, supra*.

* * * * * * * * * * * *

In *Harry Roberts v. Louisiana, supra*, this Court stated that it is constitutionally essential that *whatever* mitigating circumstances are relevant to the offender and the offense must be considered in the decision of whether the offender should be put

to death, 97 S. Ct. 1996. We have demonstrated that of factors which this Court has held to be relevant in that decision, no less than five pertain favorably to Petitioner, and all five are precluded by Ohio law from consideration by the sentencing authority. We have shown further that other mitigating circumstances considered important in capital sentencing in other jurisdictions are similarly unavailable to Petitioner in Ohio, although they also pertain favorably to Petitioner.

The character and record of the offender have no meaningful impact upon the Ohio capital sentencing decision because of the limited and narrow scope of the statutory mitigating circumstances. The very narrowness of those circumstances has resulted in a capital sentencing scheme which is virtually mandatory and which permits no consideration of factors which this Court has held are constitutionally essential in the capital sentencing decision. Such a system offends the Constitution and the death penalty imposed by Ohio upon Petitioner should be vacated.

II.

ADDITIONAL FEATURES OF THE OHIO DEATH-SENTENCING PROCEDURE MAKE IT INADEQUATE TO MEET THE EIGHTH AMENDMENT'S REQUIREMENTS FOR A CONSTITUTIONAL CAPITAL-PUNISHMENT SCHEME, AND TWO OF THESE ADDITIONALLY VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS.

We have seen that the rigid and mechanical nature of the Ohio death-sentencing procedure, which excludes meaningful consideration of the character or even the degree of culpability of the offender, fails to provide a reliable process for determining the appropriateness of imposing the death penalty in any particular case. Other features of the Ohio procedure compound this vice and render Ohio's system thoroughly incapable of assuring the

Eighth Amendment values will be respected in the process of capital sentencing. The jury is completely barred from participation in that process, with the result that death sentences are meted out unchecked by contemporary community standards of decency. (Subpart II(A) *infra*.) Indeed, capital defendants are needlessly discouraged from asserting their right to jury trial even upon the issues of guilt and degree, in violation of the Sixth and Fourteenth Amendments. (Subpart II(B) *infra*.) The burden of persuading sentencing judges that Ohio's few, narrow mitigating circumstances exist is cast upon the defendant, who must thus bear the risk of error in factfinding with his life at stake. (Subpart II(C) *infra*.) And no adequate appellate review of sentencing is provided which might assure against unreliable, irregular or arbitrary results in the infliction of the extreme penalty. (Subpart II(D) *infra*.)

A. The Ohio statutory scheme for the imposition of the death penalty unconstitutionally denies the accused the right to the judgment of his peers, reflecting contemporary community standards as to the appropriateness of the death penalty in his case.

Under the Ohio statutory scheme for the imposition of capital punishment, the life or death decision of which of the two possible penalties shall be imposed is to be made solely by the trial court. The jury is excluded totally from the sentencing process, §2929.03 (C)(E) R.C. It was not always thus.

The jury has had a role in the Ohio capital sentencing process since 1898,[26] continuously until the decision in *Furman v. Georgia, supra*, in 1972. At the time *Furman* was announced, the Ohio legislature was devising a new criminal code, which then provided for jury sentencing in capital cases.[27] The legislature felt forced to revise the capital punishment statutes to

[26]Bowers, *Executions in America*, 8 (1974).

[27]Lehman & Norris, *supra*, 23 Clev. St. L. Rev. 8, 16-17.

conform to what it perceived to be constitutional requirements enunciated by *Furman*, and considering the opinion expressed by this Court in *McGautha v. California, supra*, to the effect that it was impossible to formulate standards to guide juries in capital sentencing determinations. The Ohio legislature concluded that to preserve capital punishment in a constitutionally acceptable form, it was necessary to remove the jury totally from the sentencing process.[28] History has shown that this conclusion was erroneous.

While this Court has not yet suggested that jury sentencing is required by the Constitution, it has not considered a post-*Furman* death penalty statute, such as Ohio's, which totally excludes the institution of the jury from the sentencing process. While the Florida statute providing that the jury's recommendation is "only" advisory was upheld in *Proffitt v. Florida, supra*, the Court cited with approval the position of the Florida Supreme Court that where the trial judge imposes the death penalty over a jury recommendation of life imprisonment, "the facts suggesting a sentence of death should be so clear that no reasonable person could differ," 428 U.S. at 250.

The Ohio Supreme Court has considered the constitutional challenge to the State's juryless sentencing procedure in capital cases, and has rejected the challenge. The Ohio Court cited *Proffitt* and concluded that since this Court has not yet held that a juryless procedure for inflicting the death penalty offends the Constitution, the Ohio procedure must be constitutional, *State v. Weind*, 50 Ohio St.2d 224 at 226. The Ohio Court did not address the absence in Ohio of even an advisory role for the jury as is present under the Florida statutes.

The absence of the jury from any aspect of the Ohio capital sentencing process is unconstitutional on two separate grounds:

(1) *The Sixth and Fourteenth Amendments Require Jury Determination of the Mitigating Facts, the Existence or Non-existence of Which Determines Whether the Accused Shall Live or Die.*

[28]*Id.*, at 20.

As has been demonstrated, the life or death decision to be made by the sentencing court at an Ohio penalty trial in a capital case depends totally upon the existence or nonexistence of any of three "mitigating" facts. The sentencing process thus involves three factual determinations of the kind that juries historically have made.

It is the requirement of making new factual findings in mitigation which establishes a capital defendant's right to a jury determination of those facts. Where the determination of certain facts is crucial — perhaps "of greater importance than the difference between guilt or innocence for many lesser crimes" — the State may not dilute the standards by which those facts shall be proved merely by "characterizing them as factors that bear solely on punishment," *Mullaney v. Wilbur*, 421 U.S. 684 at 698 (1975).

In *United States v. Kramer*, 289 F.2d 909 (2d Cir. 1961), Judge Friendly wrote for the Court that where an aggravating circumstance is not "an element of the crime but rather a fact going only to the degree of punishment," and where the existence of the aggravating circumstance substantially increases the severity of the punishment," the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing judge," 289 F.2d at 921.

Under the Ohio scheme the aggravating circumstances, proof of any of which will establish the offender's "eligibility" for the death penalty, must be proved by the State beyond a reasonable doubt at the guilt trial, at which the accused is entitled to a jury determination of his guilt and the existence of the aggravating circumstance, absent a valid waiver of his right to a jury trial.[29] However, the mitigating facts, more crucial to the accused than the aggravating circumstances, because it is on the presence or

[29]Had a jury been available at the penalty trial, the Petitioner's decision to waive a jury at the guilt trial would necessarily be based upon different considerations than were present here, see *post* at pp. 48 et seq. and the elements which coerced the waiver of the jury at the guilt trial herein would presumably have been absent.

absence of which that his very life depends, are established at a penalty trial from which Ohio has totally excluded jury participation, even in an advisory capacity.

Yet the mitigating "circumstances" and the aggravating "circumstances" share one essential characteristic: they are *facts*. Aggravation and mitigation are reverse sides of the same coin, the former establishing whether the offense is capital, the latter establishing whether the accused is entitled to avoid the ultimate penalty. The particular mitigating facts established by Ohio, proof of which will preclude the death penalty, have similarities to facts which are frequently raised at criminal trials on the merits as defenses to the charge: inducement by the victim is similar to the defense of consent; duress, coercion and provocation are also available as affirmative defenses on the merits; the existence of the offender's psychosis or mental deficiency as the primary cause of the offense is similar to the defense of insanity.

There is no constitutionally valid reason for the Ohio capital procedures to provide for a jury trial of the existence of aggravating facts and of these defenses to the crime, and to deny at the penalty trial the right to have a jury determine the same kinds of facts, merely because the legislature has designated those facts as "mitigating circumstances." The injustice is compounded by the fact that it is at the nonjury penalty trial that the factual determination involved is literally one of life or death for the accused.

(2) ***Ohio's exclusion of the jury from the capital sentencing process unconstitutionally removes the conscience of the community from consideration of whether the death penalty in a given case is consistent with contemporary standards of decency.***

Jury determinations are one of the two "crucial indicators of evolving standards of decency respecting the imposition of punishment in our society," and determining the validity of capital-sentencing statutes involves that contemporary standards of decency be ascertained, *Woodson v. North Carolina, supra*,

428 U.S. at 295. Jury participation in capital sentencing represents "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Indeed, "[e]xcept for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases," *McGautha v. California, supra*, 402 U.S. at 200, n.11.

The evolving standards of decency referred to above resulted, by the middle of this century, in the removal of the "onus of inflicting capital punishment" from the trial judge and had entrusted that life or death decision to the common sense judgment of the jury, *United States v. Jackson, supra*, 390 U.S. at 576 n.12. The involvement of the jury in capital sentencing reflected "a reluctance to entrust plenary powers over . . . life [and] death] . . . to one judge or a group of judges," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The states that had not abolished capital punishment had come to realize that jury sentencing "places the real direction of society in the hands of the governed . . . and not in . . . the government," Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 5 (1966), citing De Toqueville, Democracy in America 282 [Reeve transl. 1948]).

In 1968, this Court, in *Witherspoon v. Illinois*, 391 U.S. 510, 519, n.5, observed that " . . . one of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system — a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society,' " citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958). See also *Gregg v. Georgia, supra*, 428 U.S. at 190.

Ohio, by eliminating the jury from the sentencing process in capital cases, thus has deprived the accused of the benefit of the judgment of the community and has entrusted the life or death decision to agents of the state. The conscience of the community has been removed from the process, as has the right of the offender under the Constitution to have crucial facts determined

by a jury in accordance with the Sixth and Fourteenth Amendments.

Ohio's retreat from jury participation in the capital sentencing process is a hastily-devised, ill-advised attempt, not to formulate a just, constitutional procedure for the imposition of the ultimate punishment on those who deserve it, but an attempt to conform the law to the legislature's mistaken interpretation of the *Furman* decision, with the result here of a death sentence imposed without consideration of factors which the Constitution requires to form a basis for any and every capital sentence. It is tragic that Petitioner and the 75 others on Ohio's death row await death by virtue of a legislative miscalculation that the Constitution requires no jury participation in the capital sentencing procedure. The Constitution does so require, and the death sentence below should be reversed.

B. The Ohio capital punishment procedures unconstitutionally chill the exercise of basic constitutional rights by needlessly encouraging or coercing a defendant charged with capital murder into waiving his Sixth Amendment right to trial by jury and his Fourteenth Amendment right to plead not guilty.[30]

Once an offender in an Ohio capital case has been found guilty of the offense and a specification of an aggravating circumstance, he must undergo a penalty trial at which he bears the burden of persuading the trier of the fact by a preponderance of the evidence of the existence of any of the statutory mitigating circumstances. The composition of the trier of the fact at the penalty trial is determined by whether or not the defendant waived a jury at the guilt trial. If the guilt trial was to a jury, the trier of the fact at the penalty trial is the single trial judge who

[30]The grant of certiorari limited the review herein to the first Question of the Petition, which was cast in Eighth Amendment terms. However, this Sixth Amendment question was presented in the Petition as part of the first question, part I-C. See Petition for Cert. p. 21.

presided at the jury trial. If the guilt trial was held to a three judge panel pursuant to waiver of a jury, then the same three judge panel is the trier of the fact at the penalty trial, R.C. 2929.03(C). Petitioner, having waived a jury, was tried both at the guilt trial and the penalty trial by a three judge panel.

A defendant who waives a jury at the guilt trial can receive the death penalty only if the "panel of three judges *unanimously* finds that none of the [three statutory] mitigating circumstances... is established by a preponderance of the evidence." R.C. 2929.03(E). Thus, one who was tried by a jury at the guilt trial must convince the sole trial judge of the existence of a mitigating fact to avoid the death penalty; one who waives a trial by jury need convince only one of the three judges on the panel to avoid the ultimate sanction of death. We know of no other system in Anglo-American jurisprudence where a party can win his case by convincing but one-third of the trier of the fact.

Petitioner asserts that the dread of the death penalty is such that it compels many offenders, and compelled him, into waiving his right to trial by jury, in order to secure a better mathematical chance of avoiding the death penalty in the event of a conviction of the offense and a specification of an aggravating circumstance. The Ohio appellate courts below agreed that a statutory scheme which deliberately or unintentionally chills the right to trial by jury constitutionally cannot be tolerated [A. 135; A. 152]. The Ohio courts, however, disagreed that the Ohio scheme is such a procedure.

Petitioner based his attack below[31] on the decision of this Court in *United States v. Jackson*, 390 U.S. 570 (1968), in which the Court ruled unconstitutional a federal statute[32] which provided that the death penalty for violation of the Federal Kidnapping Act could be imposed only where a jury so recommended. The Court held that the statute needlessly

[31]This facet of the Ohio scheme was attacked in the trial court as well as on appeal [A. 109].

[32]18 U.S.C. §1201 (a).

encouraged guilty pleas[33] and jury waivers, in that an accused could guarantee, by pleading guilty or waiving a jury, that he would not be executed if convicted.

Significantly, in *Jackson*, this Court held the statute's unconstitutionality does not depend upon whether it "*coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them." 390 U.S. at 583. As in *Jackson*, the Ohio statute here under attack needlessly penalizes the assertion of a constitutional right.

[33]The specific question as to the needless encouragement of guilty pleas was not specifically addressed below in our attack on Ohio's death penalty statutes, as Petitioner did not enter a guilty plea. Under Rule 11(C)(3) of the Ohio Rules of Criminal Procedure, however, a trial judge may, "in the interests of justice" dismiss specifications of aggravating circumstances against capital defendants who plead guilty, thereby avoiding the death penalty. Such a procedure is just as coercive, and merits consideration when determining the constitutionality of the entire Ohio scheme for the imposition of capital punishment. The Ohio Supreme Court has been presented with this challenge and has overruled it, *State v. Weind*, 50 Ohio St.2d 224, at 228 (1977).

Ohio Crim. R. 11(C)(3) provides as follows:

> With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.
>
> If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.
>
> If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.
>
> If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

The Ohio Supreme Court distinguished our situation from *Jackson* in that in *Jackson*, the accused could guarantee avoidance of the death penalty by waiving a jury trial, whereas under the Ohio plan, the death penalty is possible under either alternative, and may be avoided under either. "[T]hus, we are confronted with only the arguably greater possibility of the avoidance of the death penalty by the requirement of unanimity within the [three-judge] panel, and not with its absolute avoidance as in *Jackson*," 48 Ohio St. 2d at 275. That Court further equated the situation with that faced in deciding whether to have a jury determine the issue of guilt or innocence, citing the greater possibility of convincing one of twelve jurors of innocence than of convincing one of the three judges of the presence of a mitigating fact.

That the possibility of avoidance of the death penalty is greater where that decision must be made unanimously by three judges is not merely "arguable." In *Rainsberger v. Fogliani*, 380 F.2d 783 (9th Cir. 1967), a defendant in a capital case attacked a Nevada statute which provided for a unanimous decision by a three judge panel before the death penalty could be imposed, claiming that he "stood a better chance of avoiding the death penalty before a single judge than before a panel of three." 380 F.2d at 783. The Ninth Circuit held:

> We cannot agree [with appellant]. A multi-judge court offers an opportunity for disagreement wholly lacking with a single judge. With such an issue as the death penalty involved, the possibility and availability of disagreement are *advantages which cannot be disregarded*. [Emphasis added]

380 F.2d at 783. We submit that the same advantages inure to Ohio capital defendants, and many of them, Petitioner included, do not disregard those advantages, waiving their right to a jury trial in order to secure that mathematical advantage.[34]

[34]In our case, for example, it would have been preferable to argue the issue of the culpability of this defendant who did not know in advance of the homicidal intent of the codefendant, nor participate in the actual slaying, to a jury, in the hope of reducing the offense to murder or manslaughter. However, it was felt that the three judge panel would offer a better chance of surviving the sentencing process if Petitioner has been convicted. The lesser offense was, however, argued to the three judge panel [R. 472 et seq.].

The Ohio Supreme Court's "analogy" that it is more difficult to convince one of three judges of mitigation than to convince one of twelve jurors of innocence is not analogous — by convincing one juror, the accused has not won anything — he has a jury "hung" at 11-1 for conviction; however, by convincing one of the three penalty trial judges when a trial jury has been waived, the offender *has* won — he has avoided the death penalty. Thus, the Ohio court's equation of the two situations is erroneous.

Further, the decision of whether or not to waive a jury is not made in a vacuum. In some cases, where there is a strong factual defense, of self-defense or alibi, there would be less compulsion or needless encouragement to waive a jury. But where, as here, there is no such defense; where an extremely damaging statement has been given and the motion to suppress the statement has been denied; and where pretrial psychiatric reports indicate that an insanity defense will not prevail, the imminence of probable conviction of the offense and the specification renders the specter of the death penalty all too real, then the Ohio statutory scheme with its built-in mathematical advantage to a defendant who waives a jury trial, coerces, or at least needlessly encourages, the waiver of the right to a jury trial.

It is not enough to cavalierly dismiss the choice as one similar to those made by defendants and their counsel in all criminal cases. In our situation, certain aspects of the case which might require a jury trial ordinarily are not worth the risk in a capital case of increasing the mathematical chance of a death sentence. While any criminal defendant has many choices to make, including whether or not to waive a jury, that choice should not be "loaded" one way or another in a capital case by procedural provisions such as are present here. The due process clause does not, we submit, require a capital defendant to make such a "Hobson's choice."

C. The Eighth Amendment and the Due Process Clause of the Fourteenth Amendment preclude the states from placing on a capital defendant the burden of proving that he should be spared, and from executing an offender when, from the evidence of mitigation, it is as likely as not that he should live.

In our Petition, we assailed the capital sentencing process of Ohio for placing the burden of proof on the accused to prove the existence of a mitigating fact by a preponderance of the evidence. The basis of that contention was this Court's holding in *Mullaney v. Wilbur, supra*. However, two cases decided since the filing of our Petition require a shift of emphasis.

In a non-capital case, *Patterson v. New York*, ____ U.S. ____, 97 S. Ct. 2319 (1977), this Court held that a State may indeed place the burden of establishing sentence-mitigating factors (there, affirmative defenses) on criminal defendants, as long as the defendant does not have to negate an element of the offense, and as long as it is still the burden of the State to prove all elements of the offense beyond a reasonable doubt. We submit that, if *Patterson* also applies to capital cases, Petitioner's attack is still meritorious.

In the other case, an Ohio capital case, *State v. Downs*, 51 Ohio St.2d at 47 (1977), the Ohio Supreme Court discussed the phrase "burden of proof" in the two senses in which the Ohio Court feels it applies: (1) the burden of going forward, or, of initial production of the evidence, and (2) the burden of persuasion, or, "the risk of non-persuasion." That Court held that in the penalty trial a capital offender does not bear the "burden of proof" in the context that the phrase is used in a trial, that is, the burden of initial production, but that he does bear the burden of proof in the sense that he bears the risk of non-persuasion, 51 Ohio St.2d at 55. The latter burden is stated as follows: "it is apparent from the statute that if the evidence is in equilibrium, the risk of non-persuasion falls upon the defendant." *Id.* The

Ohio Court then held that the statute does not violate due process.[35]

The decision of the Ohio Supreme Court in *Downs* does not change the proof requirements in any real sense. The distinctions between "burden of proof", "burden of going forward", and "risk of non-persuasion" are, in the capital sentencing context under Ohio's statutes, distinctions of semantics rather than of substance. The reason is that one who bears the risk of non-persuasion in an Ohio capital mitigation hearing has a very real burden indeed, as he stands to lose his life *even where it is as likely as not that the life-saving mitigating fact exists.* While it is undoubtedly true that the Court, in Ohio, has the burden of initial production [the psychiatric and presentence reports], and that the defendant may choose to stand on those reports, with the result that he may be spared without producing any evidence [as, for example, where the psychiatric report concludes that the offender's psychosis is the primary cause of the offense], the fact that he has the risk of non-persuasion if the evidence is in equipoise will compel him to produce all evidence which he can muster to avoid the ultimate penalty. Thus, the interpretation of the phrase "burden of proof" in the Ohio capital sentencing context means little considering the practical problems confronting an offender at a penalty trial, particularly where the reports do not clearly establish the presence of a mitigating

[35]The Ohio Supreme Court in *Downs* ruled that "neither the defendant nor the prosecution is required by statute to offer testimony or other evidence of mitigating circumstances," *Id.* at 53, and that "In a mitigation hearing the defendant does not bear the burden of initial production, . . . the court has the initial responsibility to require that certain evidence be collected and certain examinations are made [Referring to the presentence investigation of the offender and the post-conviction psychiatric evaluation]." *Id.*, at 55. The court disapproved specifically language in *State v. Woods, supra*, and *State v. Lockett*, 49 Ohio St.2d 48, to the effect that the defendant has a burden of proof to establish a mitigating circumstance by a preponderance. The Court nonetheless affirmed the death sentences of Woods, Downs and Lockett, claiming that its examination of the record in those cases revealed that since no actual burden was imposed upon the defendants, the language stricken was dicta.

circumstance. He will have the burden, whether it is characterized as the burden of production or the "risk of non-persuasion."[36]

We respectfully submit that *Patterson* does not stand for the proposition that Ohio may place the burden of proof of a mitigating circumstance on capital defendants, and that the decision in *Downs* placing the risk of non-persuasion on the defendant where the evidence is in equipoise is not constitutional.

The reason that neither *Patterson* nor *Downs* is dispositive of this issue is that where a defendant's very life depends upon whether a certain fact exists, there is an intolerable possibility of avoidable error in the determination of the non-existence of the mitigating fact if the defendant dies when the proof is in equipoise.

[36]In our Petition, we complained of the colloquy at the outset of the penalty trial where one of the judges stated that the defendant had the burden of proof of a mitigating circumstance to a preponderance, another judge agreed, and the first stated "and the defendant goes first." [A. 70]. It is urged that this statement placed the "burden" on Petitioner, in whatever sense of that word. However, we must acknowledge that at the time the colloquy occurred, the court had already met what the Ohio Supreme Court stated in *Downs* was the trial court's burden of initial production by obtaining the reports [A. 68], and Petitioner had already informed the court that he was not standing on the reports [A. 70]. The trial court also had been informed that seven witnesses had been subpoenaed, and those witnesses were in the courtroom at the time of the colloquy. Finally, the oral and written findings [A. 129, A. 20] of the trial court did not state that Petitioner had failed to meet any burden of proof, but only that upon consideration of all factors required by the statute, none of the mitigating factors had been proved to a preponderance. The Ohio Supreme Court, in its review of the penalty trial also made no mention of a failure to sustain a burden of proof, holding only that no mitigating circumstance was established to a preponderance. If, however, Petitioner is entitled to relief because of the statement of the trial court, since the Ohio Supreme Court has held that failure to raise the *Mullaney*-type burden of proof argument in the Court of Appeals (as occurred here) will preclude further review on that issue, *State v. Williams*, 51 Ohio St.2d 112 (1977), and since neither this Court nor the Ohio Supreme Court can ascertain from the record the sense in which the trial court used the phrase burden of proof, *Gardner v. Florida*, ____ U.S. at ____ , 97 S. Ct. at 1207, requires that the matter be remanded to the trial court for a new penalty trial.

This Court has recognized a qualitative difference between the death sentence and a sentence of imprisonment:

> . . . the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, supra, 428 U.S. at 305.

In *Mullaney v. Wilbur, supra*, the Court found it "intolerable" to impose a more severe sentence on the defendant ". . . when the evidence indicates *it is as likely as not* that he deserves a significantly lesser sentence." 421 U.S. at 703. Neither *Mullaney* nor *Patterson* involved capital cases. In our case, the difference is not merely of years, as in those cases, but of life and death.

Historically, the means for preventing avoidable error in criminal prosecutions has been requiring the prosecution to prove each and every fact necessary for conviction beyond a reasonable doubt, *Speiser v. Randall*, 357 U.S. 513, 525-6 (1958). The reasonable doubt requirement is guaranteed by the due process clause of the Fourteenth Amendment, *In re Winship*, 397 U.S. 358, 363 (1970).

While *Patterson* recognized that the State may impose upon a criminal defendant the burden of establishing an affirmative defense in a noncapital case, we submit that the Constitution requires a different standard in death cases. This Court has held that the sentencing process in such cases must satisfy the requirements of the due process clause, and any avoidable error in the process of imposing a sentence of death is intolerable, *Gardner v. Florida*, ____ U.S. ____ , 97 S. Ct. 1197, at 1205, (1977).

Thus, both Eighth and Fourteenth Amendment requirements must be met in a capital case, in assigning burden and degree of proof.

We respectfully submit that in capital cases, where the difference in possible sentences is qualitative, rather than of degree, the Constitution requires that the prosecution bear the burden of proving every fact necessary to the imposition of that penalty beyond a reasonable doubt. Only in this manner can it be assured as certainly as is humanly possible that no avoidable error can infect the process by which a citizen is selected for the ultimate punishment of death.

Under the Ohio statutes, where the offender will suffer death even where the evidence indicates that it is as likely as not that he should live, it is simply not enough to assert, as did the Ohio Supreme Court, that the defendant has no burden of proof, but merely shoulders the risk of non-persuasion. *See* note 35 *supra*. Under the Ohio statutes, there is no practical meaning to this distinction since the offender will die if mitigation is not proved; thus, it is *his* burden to bring forth whatever evidence he can to forestall the possibility of the death sentence.

What is required, we submit, is that the non-existence of the statutory mitigating factors must be proved beyond a reasonable doubt by the prosecution. Anything less, in a capital case, is an intolerable gamble that one will be put to death without the presence of avoidable error in the proceedings in which the ultimate decision was made. If the guilt of the offender, without which he could not be "eligible" for the death penalty must be sufficiently certain as to require proof beyond a reasonable doubt, certainly the absence of mitigating circumstances which will assure his death, must be proved by the same degree of proof, and the party with that burden should be the party which seeks the ultimate penalty, the State.

Ruling as we urge herein will place no great burden on the State. The statutory mitigating circumstances have their counterparts in typical defenses to guilt, as we have demonstrated, *ante*, p. 20. The State is on notice via the statute itself as to what those circumstances are. It would be no more difficult for the State to prove the non-existence of mitigating circumstances in a capital case, than it would be to prepare rebuttal for the defenses to the crime itself which have their counterparts in the

Ohio mitigating circumstances. To require the State of Ohio to prove the absence of mitigating circumstances would not be too cumbersome, expensive or inaccurate, *Patterson, supra*, 97 S. Ct. at 2326, particularly in a capital case where the burden on the State would be more than counterbalanced by the assurance that the factual determination on which the Ohio capital sentencing process rests is a free as is possible of the possibility of avoidable error.

There is yet another aspect to the due process considerations at the penalty trial. We have demonstrated that *Downs* does not actually change the proof requirements at the Ohio penalty trial stage; yet the decision in that case was described by Judge Celebrezze, concurring, as "further compound[ing] the confusion engendered by the much misunderstood decision in *Mullaney v. Wilbur* (citation omitted)." 51 Ohio St.2d at 66. We have also demonstrated the changing definition of mental deficiency as that term is used in the Ohio statutes, *ante* at 20-23.

Where, as this Court has indicated, any avoidable error in the process of imposing a death sentence is intolerable, *Gardner v. Florida, supra*, the process in Ohio has suffered from the frequently changing and confusing opinions of the Ohio Supreme Court on substantive and procedural matters. For almost two years, from January 1, 1974 when the new capital statutes became effective, until the decision in *State v. Bayless, supra*, in late November of 1976, the trial courts of Ohio had no guidance from the only appellate court with state-wide jurisdiction as to important procedural and substantive matters as the definition of mitigating circumstances and the procedures by which Ohio's offenders were sentenced to live or die. The definition of mental deficiency seemed to change, for a while, with every decision. The Ohio Supreme Court said in *Woods* that the defendant has the burden of proof of a mitigating circumstance, and seven months later, in *Downs* said that he does not. But what of the offenders whose penalty trials were held in between? While the burdens were not meaningfully changed, by what standards in the individual penalty trials were the respective sentences determined? The only consistency in all of the decisions of the Ohio

Supreme Court in its death penalty cases is that *every* death sentence it has reviewed has been affirmed where the conviction was not reversed on other grounds, and that occurred in only one case.

Thus, the definitional and procedural morass generated by the decisions of the Ohio Supreme Court has created a situation in which the trial courts cannot possibly ascertain which standards to apply, whether in defining the only offender-related mitigating circumstance, mental deficiency, or in determining the burdens borne by the parties in the penalty trial. This situation itself makes it impossible to avoid "avoidable" error in the sentencing process and is a violation of due process under *Gardner v. Florida.*

D. The Ohio procedure for implementation of the death penalty provides no meaningful appellate review of the appropriateness of the death sentence.

One of the salutory features of the Georgia death penalty statutes cited by the Court in *Gregg v. Georgia, supra*, is the use of the appellate process on a state-wide basis to review each death sentence vis-a-vis other death sentences so that in cases where the ultimate sanction of death is imposed, its imposition is not disproportionately severe compared with other death sentences imposed throughout the jurisdiction. Such appellate review mitigates against the arbitrary and capricious imposition of the death penalty. The Georgia plan requires each trial judge in a capital case to complete a questionnaire regarding the relevant circumstances of the case so that the state supreme court has a meaningful basis on which to compare death sentences imposed throughout the state.

This Court has also approved the appellate review of capital sentences as practiced in the State of Florida, where review of that state's capital sentences by the state's highest court resulted in the reduction of the death penalty to life imprisonment in 8 of 21 cases, *Proffitt v. Florida, supra*.

Under Ohio law and practice however, there is no meaningful appellate review on a state-wide basis of the appropriateness of each death sentence, either individually, or on a case-by-case comparison. By contrast with the Florida experience, the Ohio Supreme Court to date has reviewed 26 cases in which the death penalty was imposed. The death sentence was upheld in 25, and the 26th case was reversed for a new trial on grounds not related to the penalty or the manner of its imposition.[37] Thus, in *every* capital case in which it has upheld the conviction, the Ohio Supreme Court has affirmed the death sentence.[38]

In Ohio, appellate courts have never reviewed the appropriateness of the sentence in a criminal case as long as the sentence imposed was within the limitations prescribed by statute, *City of Toledo v. Reasonover*, 5 Ohio St.2d 22, 213 N.E.2d 179. One frequently cited Ohio authority, Ohio Jurisprudence 2d, goes further and states that in Ohio *appellate courts do not have jurisdiction* to review sentences which are within the statutory parameters, 4 O Jur.2d, *Appellate Review*, §1159. In a pre-*Furman* case, this Court recognized that Ohio law prohibited reduction of a jury's death sentence by either the trial or an appellate court, *McGautha v. California, supra*, and *Crampton v. Ohio*, 402 U.S. 183, 195 n.7 (1971). The death sentence as imposed by a three judge panel prior to *Furman* was also not reviewable, *State v. Stewart*, 176 Ohio St. 156, 198 N.E.2d 439 (1964) and *State v. Ferguson*, 175 Ohio St. 390, 195 N.E.2d 794 (1964).

In its first decision in a case where a capital sentence was imposed under the new statutory scheme here under attack, *State v. Bayless, supra*, 48 Ohio St.2d at 86, the Ohio Supreme Court promised that it would "independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by

---

[37] *State v. Lockett*, 49 Ohio St.2d 71 (1976).

[38] A complete list of the names and citations of all Ohio Supreme Court opinions in capital cases under the new statutes is annexed hereto as Appendix B.

Ohio's trial judges." However, examination of the Ohio Supreme Court's opinions in the 26 capital cases reviewed since *Bayless* indicates that no comparison of any death sentence imposed with any other as is done in Georgia, has even been attempted by the Ohio Supreme Court, and its scrutiny of the facts of the individual cases before it is inadequate to assure reliable, non-arbitrary sentencing decisions at the trial level.[39]

The failure of the Ohio Supreme Court to give adequate review for Eighth Amendment purposes of its capital sentences stems from the long-standing Ohio doctrine that appellate courts are not free to disturb findings of fact made by a trial court, *Feterle v. Huettner*, 28 Ohio St.2d 54, 275 N.E.2d 340 (1971), *Gillen-Crow Pharmacies, Inc. v. Mandzak*, 5 Ohio St.2d 201, 215 N.E.2d 377 (1966).

The Ohio Supreme Court has stated bluntly in a capital case that the mitigating circumstances are facts, and that ". . . in criminal appeals this court *will not retry issues of fact* [relating to mitigation]. In the circumstances at hand, we *confine our consideration* to a determination of whether there is sufficient substantial evidence to support the verdict rendered," *State v. Edwards*, 49 Ohio St.2d 31, 47, 358 N.E.2d 1051 at 1062 [Emphasis added].

Petitioner respectfully suggests that review of a capital sentence is not a situation in which a state's highest court should "confine its consideration" in *any* respect. Further, the "substantial evidence" test to which the Ohio court referred was cited in *Edwards, supra*, as being the same as the test set forth in *State v. Cliff*, 19 Ohio St.2d 31, 249 N.E.2d 823 (1960), a pre-*Furman* capital case. That test is so narrow as to be totally

[39]In one case, *State v. Woods, supra*, 357 N.E.2d at 1064, n.2, the Ohio Supreme Court complained that the presentence report required by statute was not in the record before it; citing its "special responsibility in capital cases to assure that the ultimate penalty of death be imposed fairly and consistently," that Court stated that such reports were "properly" to be included in the record before it. It then affirmed Woods' death sentence without, apparently, having reviewed that report. Such a practice is questionable in light of *Gardner v. Florida*, supra.

useless in assuring that Ohio's death sentences are consistently and fairly applied, for the test is that the death sentence will be upheld *unless no reasonable mind could reach the same conclusion!*

The Ohio Supreme Court is also limited in its consideration by the fact that the mitigating circumstances are those which will probably require testimony to establish, particularly with respect to the only offender-oriented mitigation, that of the presence of psychosis or mental deficiency as a primary cause of the offense. This being the case, the credibility of the witness becomes of great significance; however, the Ohio Supreme Court will not assess the credibility of witnesses upon review. *State v. Antill*, 176 Ohio St. 61, 197 N.E.2d 548 (1964).

The rigid adherence by the Ohio Supreme Court to the doctrine that it will not retry the existence of the mitigating facts nor reverse the finding by trial courts as to those facts unless no reasonable person could agree, and to the doctrine that the credibility of witnesses, including those called to testify at the penalty trial, is exclusively for the trier of the fact, assures that no meaningful appellate review of capital sentences on a case-by-case basis at the state-wide level is possible. That *every* death sentence reviewed by the Ohio Supreme Court (25 at the date of this writing) has been upheld where the conviction upon which it is based is affirmed, indicates that there is no meaningful review, and as a result, the narrow and rigid strictures limiting the trier of the fact at the penalty trial level are not subject to correction at the appellate level.

If there were some discretion in the Ohio capital sentencing process at some point in that process, factors which this Court has held to be important and constitutionally required as part of the procedure for imposing the death penalty might have a meaningful impact on the capital decision. As the trial courts are precluded from considering the character and record of the offender as a determinative factor in the life or death decision of sentencing in a capital case, the Ohio appellate courts, including the Ohio Supreme Court, are without the authority or inclination to consider such factors in reviewing the appropriateness of the

sentences in capital cases. Such a system offends the Eighth and Fourteenth Amendments to the Constitution of the United States and cannot be permitted to continue.

CONCLUSION

For the above reasons, it is manifest that the capital sentence imposed on Petitioner was imposed by the State of Ohio in violation of the constitutional proscription against cruel and unusual punishment, and in violation of his right to due process of law and to trial by jury under the Sixth and Fourteenth Amendments. The judgment of the Ohio Supreme Court should be reversed.

Respectfully submitted,

H. FRED HOEFLE
CHARLES LUKEN
400 Second National Building
830 Main Street
Cincinnati, Ohio 45202
1-513-241-1268

Attorneys for Petitioner

Of Counsel:

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
DAVID E. KENDALL
Suite 2030
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

APPENDIX A

Methodological Note:

This survey was conducted by searching for reported appellate opinions in all post-1954 cases of execution for homicide listed in the inventory in Bowers, *Executions in America* 201-400 (1974).

Reported decisions were found for 360 such cases. In two additional cases—Jose Luis Monge (Colorado) and Gary Gilmore (Utah) — there was no appeal but the facts have been widely reported.

Findings:

Of the 362 cases listed, it is clear in 346 that the individual executed for homicide personally committed a homicidal assault. In two the person executed had others commit a homicide for him. In eight other cases the facts were not reported in sufficient detail to determine whether the person executed was a non-triggerman.

The survey uncovered only six cases in which clearly identifiable non-triggermen were executed: Two in New York, two in New Jersey, one in Florida, and one in Tennessee. All six were executed in 1955.

ALABAMA

1. *Bowen* v. *State*, 274 Ala. 66, 145 So. 2d 421 (1962)
2. *Gosa* v. *State*, 273 Ala. 346, 139 So. 2d 326 (1962)
3. *Johnson* v. *State*, 272 Ala. 633, 133 So. 2d 53 (1961)
4. *Boggs* v. *State*, 270 Ala. 209, 116 So. 2d 903 (1959)
5. *Dockery* v. *State*, 269 Ala. 564, 114 So. 2d 294 (1959)
6. *Martin* v. *State*, 266 Ala. 290, 96 So. 2d 298 (1957)
7. *Johnson* v. *State*, 265 Ala. 360, 91 So. 2d 476 (1956)

ARIZONA

8. *McGee* v. *Arizona State Board of Pardons & Parole*, 92 Ariz. 317, 376 P.2d 779 (1962)
9. *State* v. *Silvas*, 91 Ariz. 386, 372 P.2d 718 (1962)
10. *State* v. *Robinson*, 89 Ariz. 224, 360 P.2d 474 (1961)
11. *State* v. *Fenton*, 86 Ariz. 111, 341 P.2d 237 (1959)
12. *State* v. *Craft*, 85 Ariz. 143, 333 P.2d 728 (1958)
13. *State* v. *Jordan*, 83 Ariz. 248, 320 P.2d 446 (1958)
14. *State* v. *Coey*, 82 Ariz. 133, 309 P.2d 260 (1957)
15. *State* v. *Thomas*, 79 Ariz. 158, 285 P.2d 612 (1955)
16. *State* v. *Folk*, 78 Ariz. 205, 277 P.2d 1016 (1954)

ARKANSAS

17. *Moore* v. *State*, 231 Ark. 672, 331 S.W.2d 841 (1960)
18. *Bracey* v. *State*, 231 Ark. 647, 331 S.W.2d 870 (1960)
19. *Nai.* v. *State*, 231 Ark. 70, 328 S.W.2d 836 (1959)
20. *Legett* v. *State*, 227 Ark. 393, 299 S.W.2d 59 (1959)
21. *Young* v. *State*, 230 Ark. 737, 324 S.W.2d 524 (1959)
22. *Hays* v. *State*, 230 Ark. 731, 324 S.W.2d 520 (1959)
23. *House* v. *State*, 230 Ark. 622, 324 S.W.2d 112 (1959)
24. *Walker* v. *State*, 229 Ark. 685, 317 S.W.2d 823 (1958)
25. *Lee* v. *State*, 229 Ark. 354, 315 S.W.2d 916 (1958)
26. *Moore* v. *State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
27. *Boyde* v. *State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
28. *Boone* v. *State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
29. *Byrd* v. *State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
30. *Smith* v. *State*, 227 Ark. 332, 299 S.W.2d 52 (1957)
31. *Jenkins* v. *State*, 222 Ark. 511, 261 S.W.2d 784 (1953)

CALIFORNIA

32. *People* v. *Mitchell*, 48 Cal. Rptr. 371 (1966)
33. *People* v. *Bentley*, 58 Cal. 2d 858 (1962)
34. *People* v. *Darling*, 58 Cal. 2d 15 (1962)
35. *People* v. *Ditson*, 57 Cal. 2d 415 (1962)
36. *People* v. *Garner*, 57 Cal. 2d 135 (1961)
37. *People* v. *Hughes*, 57 Cal. 2d 89 (1961)
38. *People* v. *Lane*, 56 Cal. 2d 868 (1961)
39. *People* v. *Carter*, 56 Cal. 2d 549 (1961)
40. *People* v. *Gonzalez*, 56 Cal. 2d 371 (1961)
41. *People* v. *Lindsey*, 56 Cal. 2d 324 (1961)
42. *People* v. *Combes*, 56 Cal. 2d 135 (1961)
43. *People* v. *Kendrick*, 56 Cal. 2d 71 (1961)
44. *People* v. *Rittger*, 55 Cal. 2d 849 (1961)
45. *People* v. *Robillard*, 55 Cal. 2d 88 (1960)
46. *People* v. *Baldonado*, 53 Cal. 2d 824 (1960)
47. *People* v. *Moya*, 53 Cal. 2d 819 (1960)
48. *People* v. *Duncan*, 53 Cal. 2d 803 (1960)[1]
49. *People* v. *Cartier*, 54 Cal. 2d 300 (1960)
50. *People* v. *Cooper*, 53 Cal. 2d 755 (1960)
51. *People* v. *Scott*, 53 Cal. 2d 558 (1960)
52. *People* v. *Wade*, 53 Cal. 2d 322 (1959)
53. *People* v. *Hooten*, 53 Cal. 2d 85 (1959)
54. *People* v. *Hamilton*, 52 Cal. 2d 636 (1959)
55. *People* v. *Jones*, 52 Cal. 2d 636 (1959)
56. *People* v. *Glatman*, 52 Cal. 2d 283 (1959)
57. *People* v. *Nash*, 52 Cal. 2d 36 (1959)
58. *People* v. *Linden*, 52 Cal. 2d 1 (1959)
59. *People* v. *Duncan*, 51 Cal. 2d 523 (1958)
60. *People* v. *Feldkamp*, 51 Cal. 2d 237 (1958)
61. *People* v. *Ward*, 50 Cal. 2d 702 (1958)
62. *People* v. *Bashor*, 48 Cal. 2d 763 (1957)
63. *People* v. *Dement*, 48 Cal. 2d 600 (1957)
64. *People* v. *Tipton*, 48 Cal. 2d 389 (1957)
65. *People* v. *Hardenbrook*, 48 Cal. 2d 345 (1957)

---

[1]Murder for hire.

66. *People* v. *Cheary*, 48 Cal. 2d 301 (1957)
67. *People* v. *Johnston*, 48 Cal. 2d 78 (1957)
68. *People* v. *Riser*, 47 Cal. 2d 566 (1956)
69. *People* v. *Abbott*, 47 Cal. 2d 363 (1956)
70. *People* v. *Reese*, 47 Cal. 2d 112 (1956)
71. *People* v. *Morlock*, 46 Cal. 2d 141 (1956)
72. *People* v. *Caritativo*, 46 Cal. 2d 68 (1956)
73. *People* v. *Jordan*, 45 Cal. 2d 697 (1955)
74. *People* v. *Pierce*, 45 Cal. 2d 697 (1955)
75. *People* v. *Thomas*, 45 Cal. 2d 433 (1955)
76. *People* v. *Berry*, 44 Cal. 2d 426 (1955)
77. *People* v. *Cavanaugh*, 44 Cal. 2d at 252 (1955)
78. *People* v. *Zilbauer*, 44 Cal. 2d 43 (1955)
79. *People* v. *Barwell*, 44 Cal. 2d 16 (1955)
80. *People* v. *Caldwell*, 43 Cal. 2d 864 (1955)
81. *People* v. *Simpson*, 43 Cal. 2d 553 (1954)[2]
82. *People* v. *Graham*, 43 Cal. 2d 319 (1954)
83. *People* v. *Santo*, 43 Cal. 2d 319 (1954)
84. *People* v. *Baldwin*, 42 Cal. 2d 858 (1954)
85. *People* v. *Byrd*, 42 Cal. 2d 200 (1954)
86. *People* v. *Rupp*, 41 Cal. 2d 371 (1953)

COLORADO

87. *People* v. *Monge*, Executed June 7, 1967 (Did not appeal, but is reliably reported to have personally committed the homicide for which he was executed. See Burton, Pileup on Death Row 68-69 (1963)
88. *People* v. *Bizup*, 150 Colo. 5 (1962)
89. *People* v. *Hammile*, 145 Colo. 577 (1961)
90. *People* v. *Wooley*, 145 Colo. 577 (1961)
91. *People* v. *Early*, 142 Colo. 462 (1960)
92. *People* v. *Leick*, 140 Colo. 564 (1959)
93. *People* v. *Gilbert*, 134 Colo. 290 (1956)
94. *People* v. *Martinez*, 134 Colo. 82 (1956)

[2]Father had his children murder his wife.

CONNECTICUT

95. *State* v. *Davies*, 146 Conn. 137 (1959)
96. *State* v. *Wojculewicz*, 142 Conn. 676 (1955)
97. *State* v. *Taborsky*, 142 Conn. 619 (1955)
98. *State* v. *Maim*, 142 Conn. 113 (1955)
99. *State* v. *Lorain*, 141 Conn. 694 (1954)
100. *State* v. *Donahue*, 141 Conn. 656 (1954)

DISTRICT OF COLUMBIA

101. *Carter* v. *United States*, 96 U.S. App. D.C. 40 (1956)

FLORIDA

102. *Blake* v. *State*, 156 So. 2d 511 (Fla. 1964)
103. *Dawson* v. *State*, 154 So. 2d 318 (Fla. 1964)
104. *Lee* v. *State*, 141 So. 2d 257 (Fla. 1963)
105. *Leach* v. *State*, 136 So. 2d 329 (Fla. 1961)
106. *Hill* v. *State*, 133 So. 2d 68 (Fla. 1961)
107. *Johnson* v. *State*, 130 So. 2d 599 (Fla. 1961)
108. *Jefferson* v. *State*, 128 So. 2d 132 (Fla. 1961)
109. *Brooks* v. *State*, 117 So. 482 (Fla. 1960)
110. *Mackiewicz* v. *State*, 114 So. 2d 684 (Fla. 1959)
111. *Daniels* v. *State*, 108 So. 2d 755 (Fla. 1959)
112. *Frazier* v. *State*, 107 So. 2d 16 (Fla. 1958)
113. *Wither* v. *State*, 104 So. 2d 725 (Fla. 1958)
114. *Nelson* v. *State*, 97 So. 2d 250 (Fla. 1957)
115. *Everett* v. *State*, 97 So. 2d 241 (Fla. 1957)
116. *Long* v. *State*, 96 So. 2d 897 (Fla. 1957)
117. *Raulerson* v. *State*, 93 So. 2d 399 (Fla. 1957)
118. *Rhone* v. *State*, 93 So. 2d 80 (Fla. 1957)
119. *Ezzell* v. *State*, 88 So. 2d 280 (Fla. 1956)
120. *LaVoie* v. *State*, 84 So. 2d 593 (Fla. 1956)
121. *Barwicks* v. *State*, 82 So. 2d 356 (Fla. 1955)
122. *Ambrister* v. *State*, 78 So. 2d 876 (Fla. 1955)
123. *Anderson* v. *State*, 78 So. 2d 876 (Fla. 1955)
124. *Dyer* v. *State*, 78 So. 2d 402 (Fla. 1955)
125. *Hornbeck* v. *State*, 77 So. 2d 876 (Fla. 1955)[3]
126. *Gillard* v. *State*, 73 So. 2d 677 (Fla. 1954)

[3]Non-triggerman in felony murder.

GEORGIA

127. *Jones* v. *State*, 219 Ga. 245 (1963)
128. *Pugh* v. *State*, 219 Ga. 166 (1963)
129. *Chandler* v. *State*, 219 Ga. 105 (1963)
130. *Dye* v. *State*, 218 Ga. 330 (1962)
131. *Smith* v. *State*, 218 Ga. 216 (1962)
132. *Wimis* v. *State*, 216 Ga. 350 (1960)
133. *Mullins* v. *State*, 216 Ga. 183 (1960)
134. *Davis* v. *State*, 215 Ga. 788 (1960)
135. *Albert* v. *State*, 215 Ga. 564 (1959)
136. *Johnson* v. *State*, 215 Ga. 448 (1959)
137. *Wilson* v. *State*, 215 Ga. 446 (1959)
138. *Bunkley* v. *State*, 215 Ga. 377 (1959)
139. *Wilson* v. *State*, 215 Ga. 282 (1960)
140. *Hill* v. *State*, 214 Ga. 794 (1959)
141. *Charlton* v. *State*, 214 Ga. 778 (1959)
142. *Woods* v. *State*, 214 Ga. 546 (1959)
143. *Murrary* v. *State*, 214 Ga. 350 (1958)
144. *Dobbs* v. *State*, 214 Ga. 206 (1958)
145. *Adams* v. *State*, 214 Ga. 131 (1958)
146. *Golden* v. *State*, 213 Ga. 481 (1957)
147. *Dupree* v. *State*, 213 Ga. 348 (1957)
148. *Mullins* v. *State*, 213 Ga. 331 (1957)
149. *Toler* v. *State*, 213 Ga. 12 (1957)
150. *Elder* v. *State*, 212 Ga. 705 (1956)
151. *Styles* v. *State*, 212 Ga. 698 (1956)
152. *Cooper* v. *State*, 212 Ga. 367 (1956)
153. *Cochran* v. *State*, 212 Ga. 245 (1956)
154. *Turner* v. *State*, 212 Ga. 199 (1956)
155. *Philpot* v. *State*, 212 Ga. 79 (1955)
156. *Domingo* v. *State*, 211 Ga. 691 (1955)
157. *Hill* v. *State*, 211 Ga. 683 (1955)
158. *Jackson* v. *State*, 211 Ga. 490 (1955)
159. *Corbin* v. *State*, 211 Ga. 400 (1955)
160. *Fields* v. *State*, 211 Ga. 335 (1955)
161. *Morgan* v. *State*, 211 Ga. 172 (1954)
162. *Williams* v. *State*, 210 Ga. 207 (1953)

IDAHO

163. *State* v. *Snowden*, 79 Idaho 266, 313 P.2d 706 (1957)

ILLINOIS

164. *People* v. *Ciucci*, 21 Ill. 2d 81, 171 N.E.2d 24 (1961)
165. *People* v. *Dukes*, 19 Ill. 2d 532, 169 N.E.2d 84 (1960)
166. *People* v. *Carpenter*, 11 Ill. 2d 60, 142 N.E.2d 11 (1957)

INDIANA

167. *State* v. *Kiefer*, 241 Ind. 176, 169 N.E.2d 723 (1960)

IOWA

168. *State* v. *Kelley*, 253 Iowa 1314, 115 N.W.2d 184 (1962)
169. *State* v. *Brown*, 253 Iowa 658, 113 N.W.2d 286 (1962)

KANSAS

170. *State* v. *Latham*, 190 Kan. 411, 375 P.2d 788 (1962)
171. *State* v. *York*, 190 Kan. 411, 375 P.2d 788 (1962)
172. *State* v. *Hickock*, 188 Kan. 473, 363 P.2d 541 (1961)
173. *State* v. *Smith*, 188 Kan. 473, 363 P.2d 541 (1961)
174. *State* v. *Andrews*, 187 Kan. 458, 375 P.2d 739 (1960)

KENTUCKY

175. *Commonwealth* v. *Moss*, 332 S.W.2d 650 (Ky. 1956)
176. *Commonwealth* v. *Bowman*, 290 S.W.2d 814 (Ky. 1956)
177. *Commonwealth* v. *DeBerry*, 289 S.W.2d 495 (Ky. 1956)
178. *Commonwealth* v. *Nichols*, 283 S.W.2d 184 (Ky. 1955)
179. *Commonwealth* v. *Milam*, 275 S.W.2d 921 (Ky. 1955)
180. *Commonwealth* v. *Merrifield*, 268 S.W.2d 405 (Ky. 1954)
181. *Commonwealth* v. *Tarrence*, 265 S.W.2d 52 (Ky. 1954)
182. *Commonwealth* v. *Tarrence*, 265 S.W.2d 40 (Ky. 1953)

LOUISIANA

183. *State* v. *Ferguson*, 240 La. 593, 124 So. 2d 558 (1960)
184. *State* v. *Faciane*, 233 La. 1028, 99 So. 2d 333 (1957)[4]
185. *State* v. *McMiller*, 233 La. 1028, 99 So. 2d 333 (1957)[4]
186. *State* v. *Bailey*, 233 La. 39, 96 So. 2d 34 (1957)
187. *State* v. *Sheffield*, 232 La. 53, 93 So. 2d 691 (1957)
188. *State* v. *Bush*, 230 La. 181, 88 So. 2d 19 (1956)[5]
189. *State* v. *Washington*, 230 La. 181, 88 So. 2d 19 (1956)[5]
190. *State* v. *Chinn*, 229 La. 984, 87 So. 2d 315 (1956)
191. *State* v. *Brazille*, 226 La. 254, 75 So. 2d 856; 229 La. 600, 86 So. 2d 208 (1956)[6]

MARYLAND

192. *State* v. *Lipscomb*, 223 Md. 599, 165 A.2d 918 (1960)
193. *State* v. *Shockley*, 218 Md. 491, 148 A.2d 371 (1959)
194. *State* v. *Kier*, 216 Md. 513, 140 A.2d 896 (1958)
195. *State* v. *Daniels*, 213 Md. 90, 131 A.2d 267 (1957)
196. *State* v. *Thomas*, 206 Md. 575, 112 A.2d 913 (1955)

MISSISSIPPI

197. *Jackson* v. *State*, 249 Miss. 202, 161 So. 2d 660 (1964)
198. *Slyter* v. *State*, 246 Miss. 821, 152 So. 2d 702 (1963)
199. *Anderson* v. *State*, 246 Miss. 402, 149 So. 2d 489 (1963)
200. *Simmons* v. *State*, 241 Miss. 481, 130 So. 2d 860 (1961)
201. *Stokes* v. *State*, 240 Miss. 453, 128 So. 2d 341 (1961)
202. *Goldsby* v. *State*, 240 Miss. 647, 123 So. 2d 429 (1960)
203. *Dean* v. *State*, 234 Miss. 376, 106 So. 2d 501 (1958)
204. *Wetzel* v. *State*, 232 Miss. 366, 98 So. 2d 767 (1957)
205. *Thompson* v. *State*, 231 Miss. 624, 97 So. 2d 626 (1956)
206. *Jackson* v. *State*, 228 Miss. 604, 89 So. 2d 626 (1956)
207. *Jones* v. *State*, 228 Miss. 458, 88 So. 2d 91 (1956)
208. *Townsel* v. *State*, 228 Miss. 110, 87 So. 2d 481 (1956)
209. *Sorber* v. *Wiggins*, 226 Miss. 693, 85 So. 2d 479 (1956)

[4]McMiller was involved along with 2 others and Faciane in a robbery of a store. Faciane shot the storekeeper's son. The opinion does not detail McMiller's degree of participation.

[5]No facts given in decision.

[6]No facts given in decisions.

210. *Russell* v. *State*, 226 Miss. 885, 85 So. 2d 585 (1956)
211. *Keeler* v. *State*, 226 Miss. 199, 84 So. 2d 153 (1955)
212. *Gilmore* v. *State*, 225 Miss. 173, 82 So. 2d 838 (1955)
213. *LaFontaine* v. *State*, 223 Miss. 562, 78 So. 2d 600 (1955)
214. *McNair* v. *State*, 223 Miss. 83, 77 So. 2d 306 (1955)
215. *Gallego* v. *State*, 222 Miss. 719, 77 So. 2d 321 (1955)
216. *Lewis* v. *State*, 222 Miss. 140, 75 So. 2d 448 (1954)
217. *Pope* v. *Wiggins*, 220 Miss. 1, 69 So. 2d 913 (1954)

MISSOURI

218. *State* v. *Anderson*, 386 S.W.2d 225 (Mo. 1963)
219. *State* v. *Tucker*, 362 S.W.2d 509 (Mo. 1963)
220. *State* v. *Moore*, 303 S.W.2d 60 (Mo. 1957)
221. *State* v. *Booker*, 276 S.W.2d 104 (Mo. 1955)

NEBRASKA

222. *Starkweather* v. *State*, 167 Neb. 477, 93 N.W.2d 619 (1958)

NEVADA

223. *Archibald* v. *State*, 77 Nev. 301, 362 P.2d 721 (1961)
224. *Steward* v. *State*, 346 P.2d 1083 (1959)

NEW JERSEY

225. *State* v. *Hudson*, 38 N.J. 364, 185 A.2d 1 (1962)
226. *State* v. *Ernst*, 32 N.J. 567, 161 A.2d 511 (1960)
227. *State* v. *Sturdivant*, 31 N.J. 165, 155 A.2d 771 (1959)
228. *State* v. *Stokes*, 19 N.J. 59, 115 A.2d 62 (1955)
229. *State* v. *A. Wise*, 19 N.J. 59, 115 A.2d 62 (1955)
230. *State* v. *H. Wise*, 19 N.J. 59, 115 A.2d 62 (1955)
231. *State* v. *Cruz*, 17 N.J. 572, 112 A.2d 247 (1955)[7]
232. *State* v. *Rios*, 17 N.J. 572, 112 A.2d 247 (1955)
233. *State* v. *Rodriguez*, 17 N.J. 572, 112 A.2d 247 (1955)[7]
234. *State* v. *Tune*, 17 N.J. 100, 110 A.2d 440 (1954)
235. *State* v. *Roscus*, 16 N.J. 415, 109 A.2d 1 (1954)
236. *State* v. *Monohan*, 16 N.J. 83, 106 A.2d 287 (1954)

[7]Non-triggermen in felony murder.

NEW MEXICO

237. *State* v. *Nelson*, 65 N.M. 403, 338 P.2d 301 (1959)
238. *State* v. *Upton*, 60 N.M. 205, 290 P.2d 440 (1956)

NEW YORK

239. *People* v. *Mays*, 13 N.Y.2d 784, 192 N.E.2d 173 (1963)
240. *People* v. *Wood*, 12 N.Y.2d 69, 187 N.E.2d 116 (1962)
241. *People* v. *Miller*, 9 N.Y.2d 839, 175 N.E.2d 547 (1961)
242. *People* v. *Downs*, 8 N.Y.2d 860, 168 N.E.2d 710 (1960)
243. *People* v. *Philips*, 8 N.Y.2d 850, 203 N.Y.S.2d 900 (1960)
244. *People* v. *Chapman*, 8 N.Y.2d 809, 202 N.Y.S.2d 25 (1960)*
245. *People* v. *Flakes*, 8 N.Y.2d 806, 202 N.Y.S.2d 21 (1960)*
246. *People* v. *Green*, 8 N.Y.2d 806, 202 N.Y.S.2d 21 (1960)*
247. *People* v. *Vargas*, 7 N.Y.2d 555, 200 N.Y.S.2d 29 (1960)
248. *People* v. *Mason*, 7 N.Y.2d 891, 197 N.Y.S.2d 200 (1960)
249. *People* v. *Keith*, 6 N.Y.2d 880, 188 N.Y.S.2d 998 (1959)
250. *People* v. *Dawkins*, 6 N.Y.2d 814, 188 N.Y.S.2d 201 (1959)*
251. *People* v. *Richardson*, 5 N.Y.2d 767, 179 N.Y.S.2d 861 (1958)*
252. *People* v. *Dan*, 4 N.Y.2d 934, 175 N.Y.S.2d 174 (1958)*
253. *People* v. *LaMarca*, 4 N.Y.2d 925, 175 N.Y.S.2d 167 (1958)
254. *People* v. *Ecksworth*, 4 N.Y.2d 923, 175 N.Y.S.2d 164 (1958)
255. *People* v. *Turner*, 4 N.Y.2d 731, 171 N.Y.S.2d 119 (1958)*
256. *People* v. *Burke*, 3 N.Y.2d 985, 169 N.Y.S.2d 743 (1957)
257. *People* v. *Santiago*, 3 N.Y.2d 809, 166 N.Y.S.2d 9 (1957)

*In the cases marked by an asterisk, the reported opinion does not describe the facts of the case; the facts were obtained from the appellate briefs.

258. *People* v. *Taylor*, 2 N.Y.2d 1009, 163 N.Y.S.2d 617 (1957)*
259. *People* v. *Browne*, 2 N.Y.2d 842, 159 N.Y.S.2d 981 (1957)
260. *People* v. *Salemi*, 2 N.Y.2d 159, 159 N.Y.S.2d 972 (1957)
261. *People* v. *Reade*, 1 N.Y.2d 959, 154 N.Y.S.2d 27 (1956)
262. *People* v. *Edwards*, 1 N.Y.2d 830, 153 N.Y.S.2d 213 (1956)
263. *People* v. *Newman*, 1 N.Y.2d 666, 150 N.Y.S.2d 196 (1956)
264. *People* v. *Byers*, 309 N.Y. 903, 134 N.E.2d 580 (1955)
265. *People* v. *Roye*, 309 N.Y. 903, 131 N.E.2d 578 (1955)
266. *People* v. *Roche*, 309 N.Y. 678, 128 N.E.2d 323 (1955)
267. *People* v. *Nichols*, 308 N.Y. 1038, 127 N.E.2d 869 (1955)*
268. *People* v. *Reed*, 308 N.Y. 1038, 127 N.E.2d 869 (1955)*
269. *People* v. *Rosario*, 308 N.Y. 723, 124 N.E.2d 337 (1954)
270. *People* v. *Wissner*, 303 N.Y. 856, 104 N.E.2d 917 (1952)*
271. *People* v. *Cooper*, 303 N.Y. 856, 104 N.E.2d 917 (1952)[a]*
272. *People* v. *Stein*, 303 N.Y. 856, 104 N.E.2d 917 (1952)[a]*

NORTH CAROLINA

273. *State* v. *Boykin*, 255 N.C. 432 (1961)
274. *State* v. *Burton*, 248 N.C. 559 (1958)
275. *State* v. *Conner*, 244 N.C. 109 (1956)
276. *State* v. *Scales*, 242 N.C. 400 (1955)

OHIO

277. *State* v. *Griffin*, 180 N.E.2d 924 (1962)
278. *State* v. *Fenton*, 172 Ohio St. 2d 540 (1961)

*In the cases marked by an asterisk, the reported opinion does not describe the facts of the case; the facts were obtained from the appellate briefs.

[a]Non-triggermen in felony murder.

279. *State* v. *Cosby*, 110 Ohio App. 222, 162 N.E.2d 126 (1960)
280. *State* v. *Byomin*, 106 Ohio App. 393, 154 N.E.2d 823 (1959)
281. *State* v. *Tannyhill*, 101 Ohio App. 466, 140 N.E.2d 332 (1956)
282. *State* v. *Allen*, 133 N.E.2d 167 (1956)

OKLAHOMA

283. *French* v. *State*, 416 P.2d 171 (1966)
284. *Dare* v. *State*, 378 P.2d 339 (1963)
285. *Doggett* v. *State*, 371 P.2d 523 (1960)
286. *Spence* v. *State*, 353 P.2d 1114 (1959)
287. *Loel* v. *State*, 300 P.2d 1013 (1956)
288. *Hendricks* v. *State*, 296 P.2d 205 (1956)
289. *Fairris* v. *State*, 287 P.2d 708 (1955)

OREGON

290. *State* v. *McGahuey*, 230 Or. 643, 371 P.2d 669 (1962)

PENNSYLVANIA

300. *Commonwealth* v. *Smith*, 405 Pa. 456, 176 A.2d 33 (1961)
301. *Commonwealth* v. *Schuck*, 401 Pa. 222, 164 A.2d 13 (1960)
302. *Commonwealth* v. *McCoy*, 401 Pa. 100, 162 A.2d 636 (1960)
303. *Commonwealth* v. *Graves*, 394 Pa. 429, 147 A.2d 416 (1959)
304. *Commonwealth* v. *Thompson*, 389 Pa. 382 (1959)
305. *Commonwealth* v. *Cole*, 384 Pa. 40 (1956)
306. *Commonwealth* v. *Gossard*, 383 Pa. 239, 117 A.2d 902; 123 A.2d 258 (1956)
307. *Commonwealth* v. *Wable*, 382 Pa. 80, 114 A.2d 334 (1955)
308. *Commonwealth* v. *Capps*, 382 Pa. 72, 114 A.2d 338 (1955)

309. *Commonwealth v. Thompson*, 381 Pa. 299 (1955)
310. *Commonwealth* v. *Lance*, 381 Pa. 293, 113 A.2d 290 (1955)
311. *Commonwealth* v. *Edwards*, 380 Pa. 52 (1954)

SOUTH CAROLINA

312. *State* v. *Young*, 119 S.E.2d 504 (S.C. 1961)
313. *State* v. *Britt*, 117 S.E.2d 379 (S.C. 1960); 111 S.E.2d 669 (S.C. 1959)[10]
314. *State* v. *Westbury*, 117 S.E.2d 379 (S.C. 1960); 111 S.E.2d 669 (S.C. 1959)[10]
315. *State* v. *Bullock*, 111 S.E.2d 657 (S.C. 1959)
316. *State* v. *Boone*, 90 S.E.2d 640 (S.C. 1955)
317. *State* v. *Chasteen*, 88 S.E.2d 880 (S.C. 1955)
318. *State* v. *Fuller*, 87 S.E.2d 287 (S.C. 1955)

TENNESSEE

319. *Gibbs* v. *State*, 300 S.W.2d 890 (Tenn. 1957)
320. *Kirkendoll* v. *State*, 281 S.W.2d 243 (Tenn. 1955)
321. *Sullins* v. *State*, 281 S.W.2d 243 (Tenn. 1955)[11]

TEXAS

322. *Johnson* v. *State*, 378 S.W.2d 76 (Tex. Cr. App. 1964)
323. *Bradford* v. *State*, 372 S.W.2d 336 (Tex. Cr. App. 1963)
324. *Lavan* v. *State*, 363 S.W.2d 139 (Tex. Cr. App. 1963)
325. *Stein* v. *State*, 172 Tex. Crim. 248, 355 S.W.2d 723 (1962)
326. *Mosley* v. *State*, 172 Tex. Crim. 117, 354 S.W.2d 391 (1962)
327. *Wilson* v. *State*, 171 Tex. Crim. 573, 352 S.W.2d 114 (1961)
328. *Luton* v. *State*, 171 Tex. Crim. 441, 350 S.W.2d 853 (1961)

[10]It is unclear from the reported opinions as to which of these co-defendants shot the victim.

[11]Non-triggerman in felony murder.

329. *Wiley* v. *State*, 171 Tex. Crim. 366, 350 S.W.2d 22 (1961)[12]
330. *Leath* v. *State*, 171 Tex. Crim. 209, 346 S.W.2d 346 (1961)
331. *Johnson* v. *State*, 169 Tex. Crim 612, 336 S.W.2d 175 (1960)
332. *Stickney* v. *State*, 169 Tex. Crim. 533, 336 S.W.2d 133 (1960)
333. *Williams* v. *State*, 169 Tex. Crim. 370, 333 S.W.2d 846 (1960)
334. *Philpot* v. *State*, 169 Tex. Crim. 91, 332 S.W.2d 323 (1960)
335. *Moon* v. *State*, 169 Tex. Crim. 14, 331 S.W.2d 312 (1959)
336. *Moses* v. *State*, 168 Tex. Crim. 206, 328 S.W.2d 885 (1959)
337. *Smith* v. *State*, 168 Tex. Crim. 102, 323 S.W.2d 443 (1959)
338. *Slater* v. *State*, 166 Tex. Crim. 66, 317 S.W.2d 203 (1958)
339. *White* v. *State*, 165 Tex. Crim. 339, 306 S.W.2d 903 (1957)[13]
340. *Shaver* v. *State*, 165 Tex. Crim. 276, 306 S.W.2d 128 (1957)
341. *Lamkin* v. *State*, 165 Tex. Crim. 11, 301 S.W.2d 922 (1957)
342. *Hall* v. *State*, 164 Tex. Crim. 573, 301 S.W.2d 161 (1957)
343. *McGowen* v. *State*, 163 Tex. Crim. 587, 290 S.W.2d 520 (1956)
344. *Webb* v. *State*, 163 Tex. Crim. 392, 291 S.W.2d 331 (1956)

[12]While it is unclear from the reported decision whether the victim was killed by Wiley or by co-defendant McDade or both, Wiley was executed whereas McDade was not.

[13]No facts stated as to which of two co-defendants killed the victim.

345. *Bingham* v. *State*, 163 Tex. Crim. 353, 290 S.W.2d 915 (1956)
346. *Washington* v. *State*, 162 Tex. Crim. 479, 286 S.W.2d 629 (1956)
347. *Walker* v. *State*, 162 Tex. Crim. 408, 286 S.W.2d 144 (1956)
348. *Farrar* v. *State*, 162 Tex. Crim. 136, 277 S.W.2d 114 (1955)
349. *Ellisor* v. *State*, 162 Tex. Crim. 117, 282 S.W.2d 393 (1955)
350. *Meyer* v. *State*, 160 Tex. Crim. 521, 276 S.W.2d 286 (1954)
351. *Brown* v. *State*, 160 Tex. Crim. 150, 267 S.W.2d 819 (1954)

UTAH

352. *State* v. *Gilmore*, (Cr. No. 6405, 4th Jud. Dist., 1976)
353. *State* v. *Kirkham*, 7 Utah 2d 108, 319 P.2d 859 (1958)
354. *State* v. *Neal*, 123 Utah 93, 254 P.2d 1053 (1953)
355. *State* v. *Braasch*, 119 Utah 450, 229 P.2d 289 (1951)
356. *State* v. *Sullivan*, 119 Utah 450, 229 P.2d 289 (1951)

VIRGINIA

357. *Fuller* v. *Commonwealth*, 201 Va. 724, 113 S.E.2d 667 (1960)

WASHINGTON

358. *State* v. *Self*, 59 Wash. 2d 62, 366 P.2d 193 (1961)
359. *State* v. *Collins*, 50 Wash. 2d 740, 314 P.2d 660 (1957)
360. *State* v. *Farley*, 48 Wash. 2d 11, 290 P.2d 987 (1955)

WEST VIRGINIA

361. *State* v. *Brunner*, 143 W. Va. 755, 105 S.E.2d 140 (1958)

WYOMING

362. *Pixley* v. *State*, 406 P.2d 662 (Wyoming 1965)

APPENDIX B

POST-FURMAN DEATH SENTENCES REVIEWED BY THE OHIO SUPREME COURT

1. *State* v. *Williams*, 51 Ohio St. 2d 112 (1977)
2. *State* v. *Shelton*, 51 Ohio St. 2d 68 (1977)
3. *State* v. *Downs*, 51 Ohio St. 2d 47 (1977)
4. *State* v. *Jackson*, 50 Ohio St. 2d 253 (1977)
5. *State* v. *Weind*, 50 Ohio St. 2d 224 (1977)
6. *State* v. *C. Osborne*, 50 Ohio St. 2d 211 (1977)
7. *State* v. *Miller*, 49 Ohio St. 2d 198 (1977)
8. *State* v. *A. Osborne*, 49 Ohio St. 2d 135 (1977)
9. *State* v. *Lane*, 49 Ohio St. 2d 77 (1977)
10. *State* v. *Lockett*, 49 Ohio St. 2d 48 (1976)
11. *State* v. *Edwards*, 49 Ohio St. 2d 31 (1976)
12. *State* v. *Perryman*, 49 Ohio St. 2d 14 (1976)
13. *State* v. *Royster*, 48 Ohio St. 2d 381 (1976)
14. *State* v. *Lytle*, 48 Ohio St. 2d 361 (1976)
15. *State* v. *Harris*, 48 Ohio St. 2d 351 (1976)
16. *State* v. *Hall*, 48 Ohio St. 2d 325 (1976)
17. *State* v. *Bates*, 48 Ohio St. 2d 315 (1976)
18. *State* v. *Bell*, 48 Ohio St. 2d 270 (1976)
19. *State* v. *Black*, 48 Ohio St. 2d 262 (1976)
20. *State* v. *Roberts*, 48 Ohio St. 2d 221 (1976)
21. *State* v. *Hancock*, 48 Ohio St. 2d 147 (1976)
22. *State* v. *Woods*, 48 Ohio St. 2d 127 (1976)
23. *State* v. *Reaves*, 48 Ohio St. 2d 127 (1976)
24. *State* v. *Strodes*, 48 Ohio St. 2d 113 (1976)
25. *State* v. *Bayless*, 48 Ohio St. 2d 73 (1976)